No. 02-337-CFX Title: Phillip T. Breuer, Petitioner
v.
Jim's Concrete of Brevard

Docketed: September 5, 2002 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Sep 3 2002	Petition for writ of certiorari filed. (Response due October 5, 2002)
	Oct 9 2002	Waiver of right of respondent Jim's Concrete of Brevard, Inc. to respond filed.
	Oct 16 2002	DISTRIBUTED for Conference of November 1, 2002
	Oct 24 2002	Response requested.
	Nov 22 2002	Brief of respondent Jim's Concrete of Brevard, Inc. in opposition filed.
	Dec 4 2002	REDISTRIBUTED for Conference of January 10, 2003
	Jan 10 2003	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 14, 2003. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 10, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 24, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 2, 2003. **********
	Jan 31 2003	Record filed.
	Feb 4 2003	Record filed.
	Feb 14 2003	Brief of petitioner Phillip T. Breuer filed.
	Feb 25 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 25 2003	LODGING consisting of twenty copies of related material received from counsel for the petitioner and distributed.
	Mar 10 2003	Brief of respondent Jim's Concrete of Brevard, Inc. filed.
	Mar 10 2003	Brief amicus curiae of United States filed.
	Mar 10 2003	Brief amici curiae of Human Resource Association of Palm Beach County, et al. filed.
	Mar 10 2003	Brief amicus curiae of Academy of Florida Management Attorneys, Inc. filed.
	Mar 24 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 24 2003	Reply brief of petitioner Phillip T. Breuer filed.
	Apr 2 2003	ARGUED.

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Supreme Court, U.S.
FILED

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an action commenced in state court under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (the "FLSA"), can be removed by the defendant to a federal district court, even though the FLSA expressly provides that the case can be "maintained" in state court?

Whether the Eleventh Circuit's Interpretation of the word "maintained" as used in the jurisdictional provisions of the FLSA conflicts with this Court's pronounced definition of the word "maintain" to be used when construing federal statutes?

Whether the conflict, disparity and deadlock of opinion between the Eleventh and First Circuits and the Eighth Circuit, and between dozens of district courts around the country, regarding whether FLSA actions commenced in state court are removable to federal court, warrants that this Court, as suggested by the Eleventh Circuit in its opinion below, grant this petition to resolve the question once and for all in order to bring uniformity to the federal courts, and eliminate widespread disparity between litigants in our federal system.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are as captioned and there are no other parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Phillip T. Breuer, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in the case of *Phillip T. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, Eleventh Circuit case number 02-10252, as that judgment affirmed an order of the United States District Court for the Middle District of Florida denying Petitioner/Plaintiff's motion to remand the District Court case back to Florida State court from which it was removed by Respondent/Defendant.

OPINION BELOW

The Eleventh Circuit's opinion, which was filed on June 5, 2002, is reported at 292 F.3d 1308, and appears in Appendix A to this petition at pages 1a through 6a.

The Eleventh Circuit's decision affirmed an unreported order of the United States District Court for the Middle District of Florida denying Petitioner/Plaintiff's motion to remand the District Court case back to Florida State court from which it was removed by Respondent/Defendant.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Eleventh Circuit filed its opinion below on June 5,

2002. No motion for rehearing or rehearing *en banc* was sought and, accordingly, the Eleventh Circuit entered its judgment as mandate on July 5, 2002. This petition has been filed with the Court within 90 days of the date the opinion under review was filed, and as such is timely pursuant to Supreme Court Rule 13.1.

STATUTES INVOLVED IN THIS CASE

The relevant substantive statutes involved in this case are as follows:

29 U.S.C. § 201, *et seq.*, is the Fair Labor Standards Act of 1938, as amended (the "FLSA"). The FLSA provides, *inter alia*, that certain employers are required to pay certain employees overtime pay for hours they work in excess of 40 in any given workweek.

29 U.S.C. § 216(b) sets out what type of damages and other relief a plaintiff in an FLSA suit can recover. This same section also provides for the jurisdiction for FLSA suits. Most relevant for this case, this section provides that "[a]n action to recover the liability prescribed [in this section] . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." (emphasis added).

28 U.S.C. § 1441(a), commonly known as "the removal statute," provides for the removal of certain federal causes of action to federal court when those actions are filed in state court based upon concurrent jurisdiction. Specifically, this section provides that "[e]xcept as otherwise expressly provided by Act

of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

This case concerns the somewhat arcane but very jurisprudentially important issue of whether under 29 U.S.C. § 216(b), the federal Fair Labor Standards Act of 1938, as amended ("FLSA"), a FLSA action, once commenced in state court, can be removed by a defendant to a federal district court. The whole of the controversy centers around Congress' statement in the above-stated provision of the FLSA that suits under the FLSA "may be maintained" in any court of competent jurisdiction. Petitioner, and many other plaintiffs like him around the country, contend that by stating FLSA suits may be "maintained" in state court once there filed, Congress has provided that FLSA suits commenced in state court cannot be removed by a defendant to a federal district court. Respondent, like many other defendants around the country, conversely contends that Congress' statement that FLSA suits may be "maintained" in state court is not an "express" prohibition against removal required by removal statute, 28 U.S.C. § 1441(a), and that therefore, FLSA suits are subject to removal.

On June 21, 2001, Petitioner commenced an action against Respondent in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, for back wages, prejudgment interest, liquidated damages, and attorneys fees pursuant to the FLSA, 29 U.S.C. §§ 201-219, and specifically, 29 U.S.C. § 216(b). Petitioner is a former employee of Respondent who alleges that he was entitled to, but failed to receive, overtime compensation from Respondent for hours he worked in excess of 40 per week over a period of several years.

On or about July 2, 2001, Respondent filed a notice of removal in the United States District Court for The Middle District of Florida. On or about July 24, 2001, Petitioner timely filed a motion in the District Court to have the case remanded

back to state court. Petitioner, in his memorandum of law in support of the motion, argued that pursuant to the FLSA and numerous well-reasoned case law interpretations thereof, FLSA actions, once commenced in state court, could be prosecuted there to final judgment, and could not be removed to a federal district court by a defendant. Respondent filed a memorandum of law in opposition to the motion. On or about the same day Petitioner filed his motion for remand, Plaintiff/Petitioner filed a motion for certification pursuant to 28 U.S.C. § 1292(b) to be allowed to petition for an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit in the event that his motion for remand was ultimately denied.

On December 7, 2001, District Judge Ralph W. Nimmons, Jr., entered an order denying Petitioner's motion for remand. (App. 8a). In a separate order entered that same day, Judge Nimmons granted Petitioner's motion for certification, finding that the District Court's order denying Petitioner's motion for remand involved a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of that order may materially advance the ultimate termination of the litigation. The District Court, in the order granting the motion for certification, directed the clerk of the District Court to administratively close the case pending a decision by the Eleventh Circuit of whether to accept the appeal, and if so, pending resolution of the appeal.

On January 15, 2002, the Eleventh Circuit granted Petitioner's request for an interlocutory appeal of the District Court's order denying Petitioner's motion to remand. A full appeal then ensued.

After briefing and oral argument, on June 5, 2002, the Eleventh Circuit issued an opinion affirming the District Court's order denying Petitioner's motion for remand. (App.

1a-6a). In that opinion, however, the Eleventh Circuit recognized that a circuit split existed and went on even further to state that the matter of the removability of FLSA actions commenced in state court was so very unsettled around the country in both the circuit and district courts that it was important "for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard." (App. 6a). The Eleventh Circuit went the further step to pronounce that "Litigants should not be treated with such disparity in our federal system." (App. 6a). Thus, while the Eleventh Circuit affirmed the District Court's order denying Petitioner's motion for remand, the Circuit Court recognized that the issue of whether FLSA cases commenced in state court are removable to a federal district court is so very unsettled, conflicting and disparate in treatment around the country that this Court should grant this petition in the interest of fairness and justice to ultimately decide the issue once and for all.

REASONS FOR GRANTING THE WRIT

I. GENERAL OVERVIEW

The express language of the FLSA provides that an action for a violation of the FLSA can be "maintained" in any state court of competent jurisdiction. 29 U.S.C. § 216(b). Thus, it is certain, and undisputed, that a suit under the FLSA can be brought in state court. The FLSA, however, is of course a federal act, and as such it is also undisputed that federal district courts also have original jurisdiction to hear FLSA cases. At issue in the instant case is whether it is proper for FLSA actions, once commenced in state court by the plaintiff, to be removed by a defendant to a federal district court. Pursuant to 28 U.S.C. § 1441(a) (the removal statute), "except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the [federal district] courts . . . have original jurisdiction may be removed . . . to [a federal district] court . . . ." The ultimate question this Court is asked to decide in the instant case is whether the language of the FLSA providing that an action pursuant to the FLSA can be "maintained" in state court is an "express" provision by Congress that FLSA actions can be "maintained" to conclusion in state court (as opposed to merely being brought there), thereby prohibiting those actions from being removed to federal court under the removal statute. Though the question may appear "simple" on the surface, in practical effect it has wrecked judicial havoc nationwide.

II. THE COURT OF APPEALS' INTERPRETATION OF THE JURISDICTIONAL PROVISIONS OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 216(b), DIRECTLY AND EXPLICITLY CONFLICTS WITH THE EIGHTH CIRCUIT'S INTERPRETATION AND WITH THE INTERPRETATION OF NUMEROUS DISTRICT COURTS AROUND THE COUNTRY, AND DOZENS OF DISTRICT COURT OPINIONS NATIONWIDE CONFLICT WITH EACH OTHER ON THE SAME ISSUE IN A PROVERBIAL JURISPRUDENTIAL TRAIN WRECK

The Eleventh Circuit's interpretation of the "may be maintained" language of the FLSA in this case squarely conflicts with the interpretation of that same language in the FLSA by the Eighth Circuit, and with the interpretation of numerous federal district courts around the country. At the same time, however, the Eleventh Circuit's decision is consistent with a decision by the First Circuit and with many other decisions by various federal district courts finding on the other side of the issue[1]. To make matters just a little more confusing, two additional U.S. circuit courts of appeals have commented in *dicta* on the removableness of FLSA actions,

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1 See the Eleventh Circuit's opinion below (footnotes 1 and 2), (App. 3a-4a), where the Circuit Court lists some but not all of the dozens of district court opinions around the country which contradict each other as to whether or not FLSA cases commenced in state court are removable to federal court.

without providing any meaningful guidance.[2]

Fifty years ago, the United States Court of Appeals for the Eighth Circuit determined that once an FLSA action was commenced in state court it could not be removed to federal court. *Johnson v. Butler Brothers*, 162 F.2d 87, 90 (8th Cir. 1947). *Johnson* was the first appellate court to address the issue. The *Johnson* court held that by providing in the FLSA that an FLSA action may be "maintained" in state court, Congress intended that not only could such an action be commenced in state court, but that it could be prosecuted there to final judgment. *Id.* at 89.

Contrary to the holding and reasoning of the Eighth Circuit and the many district courts around the country which have followed or mirror its holding or reasoning, the United States Court of Appeals for the First Circuit concluded some 15 years ago that FLSA actions are removable to federal court, despite the statutory language that such actions may be "maintained" in state courts. *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986). The *Cosme Nieves* court found that, while there are sensible policy arguments against permitting removal of FLSA suits, language added to the removal statute (28 U.S.C. § 1441(a)) subsequent to the decision in *Johnson*, which language provides that federal civil

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2 The Ninth Circuit, without analysis and in a case which did not involve or implicate the FLSA, has summarily suggested that FLSA actions are removable. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1987). The Fifth Circuit has expressly rejected an opportunity to comment on the issue, but has noted that the removableness of FLSA actions is not well-settled. *Baldwin v. Sears Roebuck and Company*, 667 F.2d 458, 460 (5th Cir. 1982).

actions are removable "except as otherwise expressly provided by Act of Congress," creates a requirement that Congress give an explicit directive that cases based in federal law be non-removable, which the *Cosme Nieves* court concluded had not been done in the FLSA. *Id* at 451. The *Cosme Nieves* court concluded that Congress had not given the required explicit directive in the FLSA despite recognizing that, even after the above-quoted language was added to the removal statute, a 1958 Senate Committee Report noted that Congress itself recognized the inadvisability of permitting removal of cases arising under such laws as the FLSA. *Id.* That same Senate Report, however, which was unpersuasive to the First Circuit, has been cited to as an authority for Congressional intent by numerous district courts around the country which have held FLSA cases are not subject to removal. *See e.g., Moreland v. Gold Kist, Inc.*, 908 F. Supp. 898, 900 (N.D. Ala. 1995) ("Congress . . . has recognized the inadvisability of permitting removal of cases arising under . . . the Fair Labor Standards Act. . . .[and] has given the workman the option of filing his case in either State . . . or Federal Court."). S. Rep. No. 1830 (1958), *reprinted in*, 1958 U.S.C.C.A.N. 3099; quoted in, *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647 (N.D. 1964).

In this case, the Eleventh Circuit, in an opinion with little novel analysis, affirmed the district court's denial of Petitioner's motion for remand and pronounced that FLSA cases commenced in state court are subject to removal based upon the same rationale and analysis of the *Cosme Nieves* court. (App. 3a). Thus, the Eleventh Circuit effectively adopted the holding and reasoning of the First Circuit as its own, making the First Circuit's decision most relevant for this petition. *See id.* As to the Eighth's Circuit's decision in *Johnson*, the Eleventh Circuit rejected the holding and analysis of the *Johnson* court on the grounds that *Johnson* was decided before

the removal statute was amended in 1948. (App. 3a). It did so, however, despite that, as has been recognized by several contemporary district courts, the *Johnson* decision should still be good law today since the controlling question as to the removability of FLSA actions is Congress' intent when it enacted the FLSA, and a hyper-technical interpretation of the later-enacted removal statute cannot be used to nullify that intent. *E.g., Esquivel v. St. Andrew's Construction*, 999 F. Supp. 863-865 (N.D. Tex. 1998).

As a result of the Eleventh Circuit's decision in this matter great conflict and disparity pervades the federal court system as to whether FLSA cases commenced in state court are removable to federal court. In the Eighth Circuit such cases are clearly not removable. In the First Circuit, and now the Eleventh Circuit, FLSA cases are clearly removable. As for all the other circuits, whether a FLSA case is subject to removal still varies from court to court, case to case, and judge to judge.

At first blush, this Court might opine that the Eleventh Circuit's decision in this case would provide some guidance or uniformity for future cases around the country where the circuit courts have not decided the issue, thereby lessening the conflict. However, such has already show to be totally incorrect. Only a month after the Eleventh Circuit decided the instant case, a district court in the Fifth Circuit, in the first (and so far only) decision to cite to the case below, flatly rejected the conclusions and analysis of the Eleventh Circuit and ruled that FLSA cases commenced in state court are not subject to removal. *Castillo v. Texans Can!*, 2002 U.S. Dist. LEXIS 12673 (N.D. Tex. July 11, 2002). Thus, confusion and disparity post-*Breuer* are just as they were pre-*Breuer*. This Court should grant this petition to resolve the widespread and present conflict at the circuit and district court level as to whether FLSA suits, once commenced in state court, are removable to federal court.

III. THE COURT OF APPEALS' INTERPRETATION OF THE WORD "MAINTAINED" AS USED IN THE JURISDICTIONAL PROVISIONS OF THE FAIR LABOR STANDARDS ACT CONFLICTS WITH THIS COURT'S STATED DEFINITION OF THE WORD "MAINTAINED" TO BE USED WHEN CONSTRUING FEDERAL STATUTES

The ultimate conclusion of the Eleventh Circuit in this case was that Congress' statement in the FLSA that FLSA suits may be "maintained" in state courts was not an "express" prohibition against removal, as is required by 28 U.S.C. § 1441(a). (App. 2a-3a). In so concluding, however, the Eleventh Circuit totally ignored the definition of "maintained" as has been set forth by this Court.

This Court has twice pronounced that, in interpreting federal statutes, "to maintain a suit is to uphold, continue on foot and keep from collapse a suit already began." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377 (1933); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) (emphasis added). Based upon this Court's unambiguous definition of what it means to "maintain" a suit, removal to federal court of FLSA suits commenced in state court is patently improper. Other well-reasoned opinions of district courts around the country recognize and give due deference to this Court's definition of what it means to "maintain" a suit such as an FLSA suit in state court, and those district courts have remanded FLSA suits appropriately. *E.g., Esquivel v. St. Andrew's Construction*, 999 F. Supp. 863-865 (N.D. Tex. 1998). The Eleventh Circuit in this case, however, did not analyze or consider this Court's pronouncement on the meaning

of the word "maintain," which meaning is absolutely paramount in the context of whether FLSA suits removed to federal court should be remanded to state court.

Because the Eleventh Circuit's holding in this case as to what it means to "maintain" a suit conflicts with this Court's definition of "maintain," this Court should grant this petition to resolve this conflict which pervades the entire country.

IV. IN AN UNUSUAL AND COMPELLING STATEMENT, THE COURT OF APPEALS WENT SO FAR AS TO FIND THAT IT WAS IMPORTANT FOR THIS COURT TO RESOLVE THE QUESTIONS PRESENTED TO BRING UNIFORMITY TO THE FEDERAL COURTS AND ELIMINATE DISPARITY AMONG FEDERAL LITIGANTS

Finally, to further impress upon the Court just how important it is that this Court grant this petition, the Court should look to the very unusual and strong-worded language of the Eleventh Circuit's opinion in this case where the Circuit Court recognized the serious problem that persists around the country due to the wide-spread confusion and conflict at the circuit and district court level about the removability of FLSA cases, and where the Eleventh Circuit itself explained why this Court should grant this petition:

> Because of the long standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

Opinion below, (App. 6a) (emphasis added).

In this case, the Eleventh Circuit, though ruling contrary to Petitioner's position, recognized the patent truism that it is

unfair, unjust and almost totally arbitrary how litigants are treated throughout the country when it comes to the instant question. Depending upon what circuit, what district court, or even which district court judge a case is before, the result of a motion to remand an FLSA case back to state court in some parts of the country is no more predictable than by a flip of a coin. As noted by the Eleventh Circuit in footnotes 1 and 2 of its opinion, the circuit court conflicts aside, there are literally dozens of district court cases in conflict with each other on this issue. (App. 3a-4a).

The current extent of the problem is such that the disparity is not merely an inconsequential matter of differing opinion. The problem has reached the point that, as stated by the Eleventh Circuit, litigants are not being treated fairly. Congress is not likely to resolve this matter in the foreseeable future. The problem has persisted for half a century and Congress has not addressed it yet. Over thirty years ago the problem of the disparity and conflict at the district court level was so serious and the split of authority so hopeless that one district court appropriately remarked that the federal district courts are "apparently deadlocked over the interpretation of statutory language," and "nothing less than a decision by the Supreme Court [is required] to resolve the differing views throughout the nation." *Hill v. Moss-American, Inc.*, 309 F. Supp. 1175, 1177 (N.D. Miss. 1970). Thirty two years after *Hill*, the deadlock and conflict at the district court level is much worse; Congress has taken no action to clarify the issue; and the conflict and deadlock now is beginning to grip the circuit courts. Due to the disparity and unfairness to litigants, and the hopeless conflict in the federal courts nationwide, this Court should grant this petition to resolve this question once and for all and restore fairness to, and eliminate disparity from, our federal system as advocated by the Eleventh Circuit itself.

CONCLUSION

Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari to review the merits of the Eleventh Circuit's decision below.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10252

D.C. Docket No. 01-00763-CV-J-21TJC

PHILLIP T. BREUER,

Plaintiff-Appellant,

versus

JIM'S CONCRETE OF BREVARD, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 5, 2002)

Before WILSON, RONEY and ALARCÓN*, Circuit Judges.

PER CURIAM:

Plaintiff-appellant Phillip Breuer sued defendant-appellee Jim's Concrete of Brevard, Inc. in Florida state court for unpaid wages, liquidated damages, prejudgment

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* Honorable Arthur L. Alarcón, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

interest, and attorney's fees under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et. seq.* Jim's Concrete removed the case to federal court pursuant to 28 U.S.C. §§ 1441, 1446, and Breuer subsequently moved to remand it back to state court. The United States District Court for the Middle District of Florida (Nimmons, J.) denied the motion for remand. An interlocutory appeal was certified. We affirm.

The question before this Court is whether the district court properly denied remand to state court on the ground that Congress did not expressly provide that an FLSA action, once started in state court, was not removable to federal court.

The argument turns on the interpretation of the words in the FLSA juxtaposed against the words in the removal statute. The removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in a state court over which the district courts of the United States have original jurisdiction may be removed by the defendant to the federal district court except as **"otherwise expressly provided by Act of Congress."** The FLSA, 28 U.S.C. § 216(b), provides that an action to recover under the statute **"may be maintained"** against any employer in any federal or state court of competent jurisdiction.

Appellant Breuer argues that the words "may be maintained" is an express provision by Congress that once an action is started in state court, it must remain there and cannot be removed. Jim's Concrete argues that those words do not amount to such a Congressional express prohibition of removal as required by the removal statute.

In this matter of first impression for this Circuit, we follow the guidance of Judge Levin H. Campbell writing

for the First Circuit in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986). The court there held that without an "explicit statutory directive by Congress," FLSA cases may be removed from state court to federal court, and that § 216(b) was not such an express statutory prohibition against removal. *Id.* at 451. We adopt the reasoning of that opinion and it is unnecessary to repeat it here.

We note, as did the First Circuit, that the Eighth Circuit held in 1947 that FLSA cases brought in state court are not subject to removal. *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947). One year after that decision, however, in 1948, Congress amended the general removal statute by adding the "except as otherwise expressly provided by Act of Congress" language. The Eighth Circuit focused on the "may be maintained" language of the FLSA and inferred that by those words, Congress intended to grant the plaintiff not only the right to file his action in state court, but also the right to prosecute the action to final judgment in that chosen forum. Interpreting the intent of Congress from the inferential meaning of its statutes is a far different exercise, however, from looking at the plain meaning of a statute for an express provision, a task with which the Eighth Circuit was not faced in *Johnson v. Butler Bros.* Starting in 1946, two years before *Johnson v. Butler Bros.* and continuing to the present time, district courts across the country have been split on this issue, with the great majority of them permitting removal.[1, 2, 3]

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[1] For district court cases that have allowed removal, *see Ehle v. Williams & Boshea, L.L.C.*, Slip Copy, 2002 WL 373271 (E.D. La. 2002); *Hesni v. Williams & Boshea, L.L.C.*, Slip Copy, 2002 WL 373273 (E.D.

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La. 2002); *Shaw v. CF Data Corp.*, Slip Copy, 2001 WL 1326528 (N.D. Tex. 2001); *Roseman v. Best Buy Co., Inc.*, 140 F.Supp.2d 1332 (S.D. Ga. 2001); *Valdivieso v. Atlas Air, Inc.*, 128 F.Supp.2d 1371 (S.D. Fla. 2001); *Brown v. Sasser*, 128 F.Supp.2d 1345 (M.D. Ala. 2000); *Mincy v. Staff Leasing, L.P.*, 100 F.Supp.2d 1050 (D. Ariz. 2000); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F.Supp.2d 583 (E.D. Tex. 1998); *H & R Block, Ltd. v. Housden*, 24 F.Supp.2d 703 (E.D. Tex. 1998); *Lisai v. Chevron Stations, Inc.*, 1997 WL 694705 (N.D. Tex. 1997); *Barrois v. Hilton Title*, 1996 WL 312063 (E.D. La. 1996); *Brown v. Luk, Inc.*, 1996 WL 280831 (N.D.N.Y. 1996); *Troutt v. Stavola Bros., Inc.*, 1994 WL 772148 (M.D.N.C. 1994); *Loutfy v. R.R. Donnelley & Sons Co.*, 1992 WL 97761 (N.D. Ill. 1992); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F.Supp. 989 (E.D. Mo. 1991); *Nesbitt v. Bunn Basket, Inc.*, 780 F.Supp. 1151 (W.D. Mich. 1991); *Isaac v. Wm. H. Pflaumer & Sons, Inc.*, 1990 WL 102808 (E.D. Pa. 1990); *Fraternal Order of Police, Red Rose Lodge No. 16 by Gainer v. City of Lancaster*, 1989 WL 60440 (E.D. Pa. 1989); *Spieth v. R & B Appliance Parts*, 1989 WL 56486 (D. Ariz. 1989); *Jacobson v. Holiday Travel, Inc.*, 110 F.R.D. 424 (E.D. Wis. 1986); *Ramos v. H.E. Butt Grocery Co.*, 632 F.Supp. 342 (S.D. Tex. 1986); *Taylor v. Brown*, 461 F.Supp. 559 (E.D. Tenn. 1978); *Barrett v. McDonald's of Okla. City*, 419 F.Supp. 792 (W.D. Okla. 1976); *Anthony v. West Coast Drug Co.*, 331 F.Supp. 1279 (W.D. Wash. 1971); *Hill v. Moss-Am., Inc.*, 309 F.Supp. 1175 (N.D. Miss. 1970); *Goettel v. Glenn Berry Mfrs., Inc.*, 236 F.Supp. 884 (N.D. Okla. 1964); *Niswander v. Paul Hardeman, Inc.*, 223 F.Supp. 74 (E.D. Ark. 1963); *Buckles v. Morristown Kayo Co.*, 132 F.Supp. 555 (E.D. Tenn. 1955); *Rossi v. Singer Sewing Mach. Co.*, 127 F.Supp. 53 (D. Conn. 1953); *Swettman v. Remington Rand, Inc.*, 65 F. Supp. 940 (S.D. Ill. 1946).

[2] For District court cases that have denied removal, *see Lopez v. Wal-Mart Stores, Inc.*, 111 F.Supp.2d 865 (S.D. Tex. 2000); *Esquivel v. St. Andrews Const.*, 999 F.Supp.2d 863 (N.D. Tex. 1998); *Pauly v. Eagle Point Software Co., Inc.*, 958 F.Supp. 437 (N.D. Iowa 1997); *Courtwright v. Bd. of Regents of Cent. Mo. State Univ.*, 1991 WL 255594 (W.D. Mo. 1991); *Bintrim v. Bruce-Merilees Elec. Co.*, 520 F.Supp. 1026 (W.D. Pa. 1981); *Haun v. Retail Credit Co.*, 420 F.Supp. 859 (W.D. Pa. 1976); *Carter v. Hill & Hill Truck Line, Inc.*, 259 F.Supp. 429 (S.D. Tex. 1966); *Wilkins v. Renault Southwest, Inc.*, 227 F.Supp. 647 (N.D. Tex. 1964); *Zorilla v. Puerto Rican Cement Co.*, 227 F.Supp. 159 (D.P.R. 1964); *Rolon v. Flexicore Co.*, 216 F.Supp. 954 (D.P.R. 1963); *Dando v. Stonhard Co.*, 93 F.Supp. 270 (W.D. Mo. 1950); *Maloy v. Friedman*, 80 F.Supp. 290 (N.D. Ohio 1948).

In other statutes where Congress has expressly prohibited removal, it did so in direct, unequivocal language. *See, e.g.*, 28 U.S.C. § 1445; 15 U.S.C. § 77v(a); 15 U.S.C. § 1719; 15 U.S.C. § 3612.

28 U.S.C. § 1445 states that "(a) **A civil action in any State court** against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, **may not be removed** to any district court of the United States. (b) **A civil action in any State court** against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of title 49, **may not be removed** to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive or [sic] interest and costs. (c) **A civil action in any State court** arising under the workmen's compensation laws of such State **may not be removed** to any district court of the United States." 28 U.S.C. § 1445 (emphasis added).

15 U.S.C. § 77(v)(a) states, in part, that "**[n]o case** arising under this subchapter and **brought in any State court** of competent jurisdiction **shall be removed to any court of the United States**."

Both 15 U.S.C. §§ 1719 and 15 U.S.C. § 3612 state, in part, that "**[n]o case** arising under this chapter and **brought in any State court** of competent jurisdiction

[3] We note that there is a split within the district courts of the Eighth Circuit, and one of those cases which held in favor of remand recognized that "the majority of district courts, and the only circuit courts which have addressed the removal issue, have concluded that *Johnson* is no longer a good authority in light of the 1948 amendment of § 1441(a)." *Pauly*, 958 F.Supp. at 439.

shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party."

Because of the long-standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 02-10252

District Court Docket No.
01-00763-CV-J-21TJC

PHILLIP T. BREUER,

Plaintiff-Appellant,

versus

JIM'S CONCRETE OF BREVARD, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed June 5, 2002)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 5, 2002
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PHILLIP T. BREUER,

Plaintiff,

V. CASE NO. 3:01-cv-763-J-21TJC

JIM'S CONCRETE OF BREVARD, INC.,

Defendant.
_____/

ORDER

(Filed Dec. 7, 2001)

Filed herein is Plaintiff's Motion for Remand (Dkt. 5) and Defendant's Response (Dkt. 11) in opposition thereto. The Court has previously considered the issue presented – whether a case under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, filed in state court, can be removed to federal court – in *White v. Security and Surveillance, Inc.*, Case No. 3:97-cv-811-J-21B. In *White*, this Court issued an Order denying the plaintiff's motion for remand. In considering Plaintiff's Motion for Remand (Dkt. 5) in the instant case, the Court adopts the rationale from its Order issued in *White*. Accordingly, Plaintiff's Motion for Remand (Dkt. 5) is hereby **DENIED**.

DONE AND ORDERED, at Jacksonville, Florida, this 7th day of December, 2001.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID WHITE and
PAMELA DANIEL,

Plaintiff,

V. CASE NO. 97-0811-CIV-J-21-B

SECURITY AND SURVEILLANCE, INC.

Defendant.

ORDER

(Filed Nov. 7, 1997)

This cause comes before the Court on Plaintiffs' Motion to Remand (Dkt. 5) and Defendant's Response (Dkt. 9) in opposition thereto.

General Background

This action to recover unpaid back wages, prejudgment interest thereon, liquidated damages, and attorney's fees and costs pursuant to the Fair Labor Standards Act (hereinafter sometimes referred to as "FLSA"), 29 U.S.C. §§ 201-219, was filed on June 3, 1997, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, by Plaintiffs David White and Pamela Daniel against Defendant Security and Surveillance, Inc. On June 27, 1997, Defendant filed its Notice of Removal (Dkt. 1), removing this action to this Court pursuant to 28 U.S.C. § 1441, based on this Court's asserted original jurisdiction over Plaintiffs' cause under 28 U.S.C. § 1331. Plaintiffs have now moved to remand this action to the state court, asserting that removal of the action was improper.

Plaintiffs' Motion to Remand

In support of their Motion to Remand, Plaintiffs rely upon the language of 29 U.S.C. § 216(b), a provision of the FLSA which expressly provides that an action to recover thereunder "may be maintained . . . in any Federal or State court of competent jurisdiction. . . . "[1] Thus, Plaintiffs assert, uncontradicted, that this action was properly brought in the Florida Fourth Judicial Circuit Court. Further, pointing to the use of the word "maintained" in § 216(b), Plaintiffs note that various other federal courts, including one federal court of appeals, have interpreted this language to mean that once an FLSA suit is commenced in state court, it cannot be removed to federal court. Acknowledging that this issue has not been addressed by the Eleventh Circuit, Plaintiffs argue that the intent of Congress in enacting both the FLSA and the removal provisions of Title 28, in conjunction with various public policy concerns, support the conclusion that FLSA suits commenced in state court can not be removed to federal court.

---

[1] Prior to 1974, and the amendments effected by Pub. L. 95-151, § 10(a), (b), 29 U.S.C. § 216(b) provided that an action to recover under the FLSA "may be maintained in any court of competent jurisdiction. . . . " However, even prior to its amendment, the language of § 216(b) was interpreted to allow the initiation of suits under the FLSA in both state and federal courts. *See, e.g., Crouse v. North American Aviation of Kansas*, 68 F. Supp. 934, 935 (W.D. Mo. 1946). Further, as the pre-1974 version of § 216(b) used the identical phrase "may be maintained," the 1974 amendment is, for purposes of the issues currently before the Court, immaterial.

In opposition to remand, Defendant relies upon 28 U.S.C. § 1441, pursuant to which it removed this action to this Court. Section 1441(a) provides, in pertinent part, as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where the action is pending.

Defendant notes both that FLSA actions fall within the original jurisdiction of the federal district courts under 28 U.S.C. § 1331 and that there exists no express act of Congress prohibiting the removal of FLSA actions to federal district courts, whether generally as a part of Chapter 89 of Title 28, which sets forth the general scheme of removal, or specifically as a part of the FLSA. Thus, Defendant argues that this Court should, as have various other federal courts, including one federal court of appeals, deny Plaintiffs' Motion to Remand.

Plaintiffs primarily rely upon the case of *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947). The plaintiff in *Johnson* commenced an FLSA action in Minnesota state court and the defendant therein removed the action to federal court; the plaintiff thereafter filed a motion to remand which the district court denied. *Id.* On appeal, the Eighth Circuit reversed the denial of the motion to remand, based on the language of § 216(b) providing that an FLSA action "may be maintained" in state court. *Id.* at 88-89. The court noted that the word "maintained" and the word "brought" both include commencement or institution

of an action, but that the former was broader in meaning than the later, as it also included prosecution through to final judgment. *Id.* at 89. Reasoning that allowing the removal of state-court initiated FLSA actions to federal court could prevent all such actions from being prosecuted through to final judgment in state court, and thereby render the term "maintained" but a "truism ... [or] surplusage," the Eighth Circuit concluded that such actions could not be removed, thereby avoiding an unpalatable interpretation of the statute. *Id.* The Court was buoyed in this result based on its conclusion that such an interpretation of § 216(b) would "do no violence to the removal statute" of Title 28 as it then existed. *Id.*

In response, Defendant points to the 1948 consolidation and revision of the removal statutes, the result of which is Chapter 89 of Title 28 substantially in the form in which it exists today. Arguably one of the central provisions of Chapter 89, § 1441(a) provides, as quoted above, that "[e]xcept as otherwise expressly provided by Act of Congress" any state court civil action over which the federal district court has original jurisdiction may be removed by the defendant to that federal court. Defendants assert that the *Johnson* court's interpretation of the word "maintained," which relies on inferences about Congressional intent based solely on word usage, is insufficient to qualify as an "express[ ] provi[sion] by Act of Congress," as required by § 1441(a).

In rebuttal, Plaintiff cites to a 1958 Senate Report on a bill which, inter alia, enacted 28 U.S.C. § 1445(c), a provision which expressly prohibits the removal to federal court of state court civil actions arising under state workmen's compensation laws. *See* S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099. After noting that

workmen's compensation cases are entirely creatures of state law, that the federal courts were overburdened, and expressing the opinion that removal of workmen's compensation cases to federal court preempted the operation of favorable summary procedures and venue restrictions available to plaintiffs under state law, thereby possibly working a hardship on such plaintiffs, the Senate Report continued its argument in favor of the bill, stating:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, The Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State Courts the law prohibits removal to the Federal Court. This proposed legislation accomplishes the same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation laws. . . . "

Id. at 3106. Noting that the Supreme Court has held that "the touchstone of the federal district court's removal jurisdiction . . . is the intent of the Congress,"[2] Plaintiffs argue that the statement in this Senate Report is a clear and unambiguous statement of Congress' intention that FLSA actions not be allowed to be removed to federal court; further, Plaintiffs argue, the statement constitutes

[2] *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).

Congressional approval of the Eighth Circuit's decision in *Johnson*, discussed *supra*.

Defendant responds by reference to the case of *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986), wherein the First Circuit, in concluding that FLSA actions could be removed to federal court, inter alia, considered the significance of this Senate Report. After their employer removed the action to federal court, the *Cosme Nieves* plaintiffs, who had originally sued their employer in the Commonwealth court of Puerto Rico, moved to remand the suit to that court. *Id.* at 446. The district court denied the motion and plaintiffs appealed. *Id.* As in *Johnson* and as do Plaintiffs herein, the *Cosme Nieves* plaintiffs relied principally on the phrase "may be maintained" in 29 U.S.C. § 216(b) of the FLSA. *Id.* at 450. The First Circuit recognized the existence of the *Johnson* decision, but also recognized the 1948 amendments to Title 28, Chapter 89. *Id.* at 451. Reasoning that the "words 'expressly provided' [in § 1441(a)] must be construed to mean exactly that," and concluding that the ambiguous language of § 216(b) was "at best . . . suggestive" and not "an explicit statutory directive by Congress that the customary right to remove is abrogated in the instance of FLSA suits," the First Circuit declined to prohibit the removal of such suits. *Id.* In a footnote, the court noted that plaintiffs therein relied in part on the above-mentioned 1958 Senate Report. The First Circuit found this report to be unpersuasive authority for the plaintiffs' position, as the "amendment under discussion [in the report] involved 28 U.S.C. § 1445, . . . and neither 28 U.S.C. § 1441 nor 29 U.S.C. § 261(b) is mentioned or affected by the amendment. At best the statement is . . . an 'oblique reference.'" *Id.* at 451 n.18.

In response, Plaintiffs argue that the *Cosme Nieves* opinion "gave no weight" to the opinion in the Senate Report and "too quickly ignore[d] both the intent of Congress and the purpose of the removal statute in reaching its conclusion." (Dkt. 6 at 9). Plaintiffs assert that regardless of the fact that the bill discussed in the Senate Report did not affect either § 1441(a) or § 216(b), the statement in the report is nonetheless a "clear and unambiguous" expression of Congressional intent – the very thing that the Supreme Court has directed is to be examined in interpreting the removal statutes of Title 28 – leaving no room for doubt that Congress thought the *Johnson* case was correctly decided. Further, Plaintiffs take issue with the First Circuit's (at least implicit) conclusion that the 1948 amendments to Title 28 overruled the *Johnson* decision, arguing that in so reasoning the court went against the stated Congressional intent to limit, not extend, removability through enactment of those amendments. Continuing, Plaintiffs assert that when enacting the 1948 amendments to Title 28, Congress had in mind various policy considerations against removal of FLSA actions – namely, that removal was often merely a tool to delay, increase the costs of litigation, and harass a plaintiff, such as by relocating a small controversy from a rural state court to a distant federal court. Lastly, in favor of allowing a FLSA plaintiff the absolute choice of the forum of adjudication, Plaintiffs emphasize the primacy that the law places on wages and the recovery of earned wages and, consequently, the importance of facilitating the fastest and cheapest possible resolution of such claims – i.e., as Plaintiffs assert, allowing full prosecution of this suit in state court.

Additionally, Plaintiffs rely upon dictum from a decision of this Court construing the jurisdictional grant contained in the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §§ 1601-1693r. Provisions of the various subchapters of that act allow actions thereunder to "be brought in any appropriate United States district court . . . , or in any other court of competent jurisdiction." 15 U.S.C. 1640(e); 1681p. The plaintiff in *Griffin* had initiated his action under the CCPA in state court, and the defendant therein had removed it to this Court. In concluding that the CCPA action was due to be remanded, this Court examined the language of the jurisdictional grant of the CCPA and concluded that it evidenced an intent to preclude the removal of CCPA actions already commenced in state court. In reaching this conclusion, this Court relied (as explicitly stated) in part on an analogy to the jurisdictional grant of the FLSA contained in § 216(b), an analogy which had been the sole basis for the same conclusion regarding the removability of FLSA actions made by the court in *Ruth v. Westinghouse Credit Co.*, 373 F. Supp. 468 (W.D. Okl. 1974), the only authority regarding removability cited in Court's *Griffin* opinion. Plaintiffs thus assert that "this Court has adopted, both implicitly and explicitly, the holding of [the Eighth Circuit] in *Johnson*. . . . " (Dkt. 6 at 7).

Finally in rebuttal, Defendant offers dictum from the Ninth Circuit's opinion in *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988), in which, in the context of deciding whether a federal RICO claim could be removed to federal district court, the Ninth Circuit examined and commented upon a number of federal statutes over which there was concurrent jurisdiction between state and federal courts, noting that some, like the FLSA, contained

no prohibition on removal, while other federal statutes did.[3]

In addition to the foregoing, as noted by the parties, a number of lower federal courts have decided the issue presently before this Court. Some have allowed removal; others, including two districts within this circuit, have prohibited it.[4]

Having examined all of the foregoing authorities, as well a number of the lower court opinions on this issue, the Court concludes that the better view is that FLSA actions can be removed to federal district court. In 28 U.S.C. § 1441(a), Congress has plainly stated that absent an express statutory provision to the contrary, the right of removal to federal district court exists as to all actions over which the district courts have original jurisdiction. As the FLSA is a federal statute, providing various rights and remedies for violations of those rights, an action thereunder is undisputably one over which this Court has original jurisdiction. *See* 28 U.S.C. § 1331. Plaintiffs can not cite to the Court any express provision regarding the FLSA, whether as part of Title 28 or the FLSA itself, which prohibits removal of those actions to this Court.

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[3] Although noted cited by either party, the Court would also point out that noteworthy commentators have expressed the opinion that removal of FLSA actions should be allowed. Charles A. Wright et al., *Federal Practice and Procedure* § 3729, pp. 495-98 (1985) (noting the split of authority and concluding that the better view is that FLSA actions should be allowed to be removed since there exists no express provision by Congress prohibiting removal, as required by § 1441(a)).

[4] *Babula v. Alachua County Bd. of Commissioners*, No. GCA 91-10044-MMP (N.D. Fla. March 27, 1991); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S.D.Ga. 1943).

Thus, as to the FLSA, the plain requirements of § 1441(a) have not been met – a conclusion which abides whether or not one strictly construes the removal statute, as Plaintiffs assert the Court is obliged to do in instances of ambiguity or doubt.

Further, the Court would note that as to other federal statutes Congress has clearly demonstrated that it knows how to "expressly provide otherwise by Act of Congress" and thereby satisfy § 1441(a), whether as part of the general provisions of Title 28, *see* 28 U.S.C. § 1445(a)-(b), (d) (prohibiting the removal of actions brought in state court pursuant to various federal statutes, including the Federal Employers' Liability Act), or as part of particular federal statutes themselves, *see* 15 U.S.C. § 77v(a) (prohibiting the removal of actions brought in state court pursuant to the Securities Act of 1933). This Court therefore cannot conclude, as did the *Johnson* court, that prohibiting the removal of FLSA actions would "do no violence to the removal statute," 162 F.2d at 89. Such a prohibition on removal would, in fact, do significant violence to the removal statute, for it would effectively elevate the fact of the existence of one arguably ambiguous word in the FLSA and an opinion in an unrelated Senate Report to the status of an express provision by Act of Congress.

Upon consideration thereof, it is hereby **ORDERED** that Plaintiffs' Motion to Remand (Dkt. 5) is **DENIED.**

DONE AND ORDERED, at Jacksonville, Florida, this 7th day of November, 1997.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to: Counsel of Record
Denise Seymour, Courtroom Deputy Clerk
Margaret Costa, Judicial Assistant

Supreme Court, U.S.
FILED
NOV 22 2002

No. 02-337

IN THE

Supreme Court of the United States

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Jim's Concrete of Brevard, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This case arises out of an order from the United States District Court, Middle District of Florida, denying Petitioner Phillip T. Breuer's ("Petitioner") motion for remand.[1] On or about June 21, 2001, Petitioner filed suit against Jim's Concrete of Brevard, Inc. ("Respondent") in state court in Duval County, Florida seeking unpaid wages, liquidated damages, and attorney's fees for alleged violations of the Fair Labor Standards Act 29 U.S.C. § 201, *et seq.* ("FLSA"). Respondent timely removed the case to the United States District Court, Middle District of Florida pursuant to 28 U.S.C. §§ 1441 and 1446. Petitioner subsequently filed a Motion for Remand, arguing that FLSA lawsuits may not be removed to federal court. Petitioner filed a Motion for Certification Pursuant to 28 U.S.C. § 1292(b) to take an interlocutory appeal contemporaneously with the Motion for Remand. On December 7, 2001, the district court sided with the majority of courts to address the issue in recent years, and entered an order holding that FLSA actions may be removed to federal court.

That same day, the district court entered a separate order granting Petitioner's Motion for Certification. Petitioner then filed a petition requesting that the Eleventh Circuit Court of Appeals permit him to take an immediate appeal of the district court's order denying his Motion for Remand. On or about January 15, 2002, the Eleventh Circuit entered an Order granting the petition. On June 5, 2002, after briefing and oral argument, the Eleventh Circuit, just like the district court,

1. Appendix "C" to the Petition for Writ of Certiorari purports to contain a complete copy of the District Court's order denying the Petitioner's Motion for Remand, but does not. The missing portion of the order is attached hereto in the Appendix.

sided with the majority, and held that FLSA actions may be removed. As a result, the Eleventh Circuit issued an opinion affirming the District Court's order denying Petitioner's Motion for Remand. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

Respondent takes no issue with Petitioner's statement of the question presented. The resolution of this case does indeed turn on the interpretation of statutory language contained in 28 U.S.C. § 1441(a) and 29 U.S.C. § 216(b), respectively. Specifically, the issue is whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction" as used in FLSA, constitutes an express Act of Congress prohibiting the removal of FLSA claims.

Respondent submits that the Eleventh Circuit Court of Appeals was correct in joining a growing majority of courts deciding that Congress' use of the phrase "may be maintained" does not constitute an express prohibition against removal of FLSA claims. As a result, Respondent submits that this case was both properly removed and properly resolved by the court below. Since the opinion below is consistent with the reasoning of the growing number of courts allowing removal of FLSA claims, this case is not one that requires this Court's intervention. As a result, Respondent requests that the Court deny the Petition for Writ of Certiorari. Alternatively, Respondent requests that the Court grant the Petition, and enter an Order summarily affirming the Eleventh Circuit in accordance with Rule 16.1, Supreme Court Rules.

REASONS FOR DENYING THE PETITION

I. Congress Has Not Expressly Prohibited Removal of FLSA Claims.

Many of the cases that come before this Court involve both complicated facts and issues. This case is different. It has neither complicated facts, nor complicated issues. While acknowledging an apparent split in authority among opposing circuit courts, this case was easily resolved by the court below through the interpretation of straightforward statutory language.

The sole issue in this case is whether Congress has included an express prohibition against removal in the FLSA. Any analysis of this issue must start with the plain language of the relevant statutes. *See, e.g., Sygenta Crop Protection, Inc. v. Henson*, 2002 WL 31453983 (Nov. 5, 2002) (right of removal is a creature of statute and statutory procedures are to be strictly construed). Here, there are two relevant statutes.

The first is 28 U.S.C. § 1441, captioned "Actions removable generally." Under the general removal statute, civil actions brought in state court over which the federal courts have original jurisdiction may be removed to federal court "***[e]xcept as otherwise expressly provided by Act of Congress***." 28 U.S.C. § 1441(a) (emphasis supplied). This statute makes it unequivocally clear that absent an express declaration by Congress to the contrary, civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982).

There simply is no ***express*** prohibition against removal in the FLSA, the second of the two statues relevant to this case. Lexicographers have defined the term "express" to exclude ambiguity. Black's Law Dictionary defines express as "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary*, 601 (7th ed. 1999); *see also Ballantine's Law Dictionary*, 441 (3d ed. 1969) ("[s]tated, explicit, clear; declared; not left to implication); *Merriam-Webster's Collegiate Dictionary*, 410 (10th ed. 1993) ("directly, firmly, and explicitly stated"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language*, 448 (Encyclopedic Ed. 1978) ("[s]et forth distinctly; explicit; plain; direct"); *Webster's New World Dictionary*, 494-5 (2d college ed. 1982) ("specific").

In other statutes, Congress has unambiguously prohibited the removal of claims to federal court. For instance, 28 U.S.C. § 1445 is captioned "Nonremovable Actions," and *expressly prohibits* removal of claims brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* 28 U.S.C. § 1445(a) (prohibiting removal of cases brought under the Federal Employers' Liability Act); *see also* 28 U.S.C. § 1445(c) (providing that a civil action arising under state workers' compensation laws may not be removed); 28 U.S.C. § 1445(d) (prohibiting removal of cases brought under the Violence Against Women Act of 1994). Similarly, Congress has, in some cases, imposed limits on the right to removal rather than barring the right altogether. *See* 15 U.S.C. § 77v(a) (providing that cases under the Securities Act of 1933 may only be removed under certain circumstances); 28 U.S.C. § 1445(b) (providing that claims brought pursuant to 49 U.S.C. § 11706 or 14706 may only be removed if the amount in controversy exceeds $10,000); 15 U.S.C. § 1719 (providing that cases brought under the Interstate Land Sales

Full Disclosure Act shall not be removed to federal court unless the United States or an officer or employee of the United States in his official capacity are a party). In short, when Congress has intended to preclude or limit the right to removal, it has done so in no uncertain terms.

In stark contrast, actions brought under the FLSA are not listed among those that are designated "nonremoveable" by 28 U.S.C. § 1448. Nor is there any express prohibition against removal in the statute itself; indeed, the FLSA does not even mention the term removal. Instead, the statute provides that an action brought under the FLSA "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b).

Some, including the Petitioner, have seized upon this language for the proposition that removal of FLSA claims is somehow improper, going so far as to cite this Court's interpretation of the word "maintain" in *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377, 53 S. Ct. 620, 77 L. Ed. 1265 (1933) to support their argument. The *George Moore* Court, however, dealt with "maintain" in an entirely different context. In particular, the Court held that a statute authorizing a taxpayer to "maintain" a suit to recover tax, irrespective of protest, removed the requirement of protests in tax recovery actions brought after the enactment of the statute. *Id.* In *George Moore*, the Court merely found that maintain "means *no less* than to prosecute with effect." *Id.* (emphasis supplied). Importantly, the *George Moore* Court neither held nor implied that the word maintain cannot have meanings other than the one set out in the opinion. *Roseman v. Best Buy Co., Inc.* 140 F. Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

To be sure, "maintain" has meanings other than the one identified by the *George Moore* Court. In fact, Black's Law Dictionary contains six different definitions of the word. Among those definitions are "to continue (something)" and "to assert (a position or opinion)." *Black's Law Dictionary*, 601 (7th ed. 1999). Ballentine's Law Dictionary defines "maintain" to mean "[t]o support; to keep in condition; to sustain," but defines a "maintainable action" as "an action capable of being maintained; capable of being sustained or entertained by a court." *Ballantine's Law Dictionary*, 764 (3d ed. 1969); *see also Merriam-Webster's Collegiate Dictionary*, 702 (10th ed. 1993) (defining maintain to mean both "to continue or persevere in" and "to affirm in or as if in argument: assert"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language*, 768 (Encyclopedic Ed. 1978) (defining maintain to mean "to carry on or continue" and "to assert or state; affirm"); *Webster's New World Dictionary*, 854 (2d college ed. 1982) (defining maintain to mean both "to keep or keep up; continue in or with; carry on" and "to uphold or defend as by argument; affirm").

Clearly, maintain has various meanings, not just the one asserted by the Petitioner in this case. Given that the word maintain is reasonably susceptible to more than one competing meaning, the phrase "may be maintained" simply cannot be considered an explicit statutory directive by Congress prohibiting the removal of FLSA claims. *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001) ("I simply do not believe that Congress is unable to be more express than the word 'maintained' . . .")

Nevertheless, some courts have opined that FLSA actions commenced in state court must remain there. This line of

cases has its genesis in a fifty-five year-old decision from the Eighth Circuit Court of Appeals. *Johnson v. Butler Bros.*, 162 F.2d 87, 89 (8th Cir. 1947). Even the *Johnson* court recognized, however, that the FLSA does not contain an explicit Congressional directive prohibiting removal:

> This question as to the intent of Congress has given the federal courts much difficulty. . . . For this unfortunate situation the courts are not to blame. It is attributable to the *failure of congress to clearly and accurately express its intent*. . . . There can be no just criticism of those courts which have concluded that the language used by Congress was inadequate to disclose a clear intent that actions brought in state court under the [FLSA] should not be removable.

Id. at 89 (emphasis supplied). Not only did the *Johnson* court fail to find an express prohibition against removal, it agonized over the meaning and intent of the word maintained, and went so far as to criticize Congress for failing to be more clear in expressing its intent.

In reality, it is a misnomer to label the *Johnson* opinion as one that "conflicts" with the opinion below. The *Johnson* case was decided in 1947, one year before Congress amended 28 U.S.C. § 1441 to require that any prohibition against removal be by an express Act of Congress. Therefore, the *Johnson* court never addressed the statutory language at issue here. And, although *Johnson* has never been overruled, its continuing viability has been called into question, even within the Eighth Circuit. As one district court within the Eighth Circuit recently put it, "since the decision in *Johnson*, the majority of district courts, and the only circuit courts which

have addressed the issue, have concluded that *Johnson* is no longer good authority in light of the 1948 amendment to § 1441(a)." *Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 439 (N.D. Iowa 1997).

Before the decision below, only one other federal appellate court directly addressed the issue of removability of FLSA claims in light of the 1948 amendment to § 1441. *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986).[2] Not surprisingly, the court held that the "may be maintained" language in the FLSA does not constitute an express provision barring the right of removal. In *Cosme Nieves*, the First Circuit specifically addressed statements included in a Senate committee report to a bill making state workers' compensation cases non-removable. S. Rep. No. 85-1830, at 8 (1958). This report is often relied upon by those who oppose permitting removal of FLSA, who argue that the report manifests congressional intent to bar removal of FLSA actions. *Cosme Nieves*, 786 F.2d at 451 n.18. The committee report states that "Congress itself has recognized the inadvisability of permitting removal of cases" arising under such laws as the FLSA. *Id.*

The *Cosme Nieves* court observed, however, that the committee report in question involved 28 U.S.C. § 1445, making state workers' compensation claims nonremovable,

2. The Fifth Circuit suggested in dicta that FLSA actions are subject to removal in *Baldwin v. Sears Roebuck & Co.*, 667 F.2d at 460-61 (holding that Age Discrimination in Employment Act Claims, 29 U.S.C. § 621, *et seq.* are removable). In *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1996 (9th Cir. 1988) the Ninth Circuit cited the FLSA as example of federal statute which contain[s] no limitation on removal, express or otherwise, to bar removal as required under section 1441(a). This language is not, however, central to the holding in the case.

and neither 28 U.S.C. § 1441 nor 29 U.S.C. § 216(b) was cited in relation to the statement. *Id.*[3] Given the clear language barring removal in other federal statutes, the stray remark in a committee report unrelated to the FLSA does not rise to the level of an express provision by Act of Congress. *Id. See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 895, 120 S. Ct. 1913, 1933, 123 L. Ed. 2d 387 (1993) (best evidence of a statute's meaning is the text itself); *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d at 1337 ("the fact that parties are relegated to finding obscure legislative history in support of their assertion that Congress has expressly provided that FLSA claims are not removable merely underscores the reality that the statute is not express on its face.").

By its plain language, 28 U.S.C. § 1441(a) provides that nothing short of an express statutory provision precludes removal. The FLSA, however, contains no such express prohibition, and the court below joined "the overwhelming majority of jurisdictions considering the issue in recent years" permitting defendants to remove FLSA cases commenced in state court. *Bingham v. Newport News Shipbuilding and Drydock Co.*, 3 F. Supp. 2d 691, 692 (E.D. Va. 1998). *See also Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001) (use of term "maintained" is not express directive of non-removability); *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d at 1373 (words "may be maintained" are not an express exemption from the general scope of the removal statute); *Brown v. Sasser*, 128 F. Supp. 2d at 1347 (there is no "Act of Congress" barring removal of FLSA claim);

3. Nor, for that matter, does the Senate Committee Report constitute an "Act of Congress" as is required by the plain language of 28 U.S.C. § 1441. *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347 (M.D. Ala. 2000).

Shaw v. CF Data Corp., 2001 WL 1326528 (N.D. Tex. Oct. 15, 2001) ("majority of courts to consider question have permitted removal" . . . "[t]his court will follow majority and permit removal."); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F. Supp. 2d 583, 585 (1998) (use of phrase "may be maintained" does not constitute an express statement of nonremovability, and is at best, ambiguous); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989, 991 (E.D. Mo. 1991) (denying motion to remand on grounds that Congress had not expressly provided that FLSA actions could not be removed from state to federal courts); *Ramos v. H. E. Butt Grocery Co.*, 632 F. Supp. 342, 343 (E.D. Pa. 1986) (denying motion to remand on grounds that unlike other federal statutes, FLSA did not include express prohibition on removal); *Taylor v. Brown*, 461 F. Supp. 559, 560 (E.D. Tenn. 1978) (holding that FLSA action could be removed to federal court).

In short, this case was properly resolved by the court below in accordance with a growing trend through simple statutory interpretation. It is not a case that requires this Court's intervention, and as a result, the Petition for Writ of Certiorari should be denied. Alternatively, if the Court is inclined to grant the Petition, it should summarily dispose of the case by affirming the decision below. *See, e.g., United States v. Lane Motor Co.*, 344 U.S. 630, 73 S. Ct. 459, 97 L. Ed. 622 (1953) (granting petition and summarily disposing of case to resolve conflict where the judgment below is obviously correct and the conflicting decision is so clearly wrong).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Eleventh Circuit Court of Appeals correctly affirmed the district court's order denying Petitioner's Motion for Remand. As a result, Respondent requests that this Court deny the Petition for Writ of Certiorari. Alternatively, Respondent requests that the Court summarily dispose of the Petition for Writ of Certiorari by affirming the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DATED AND FILED DECEMBER 7, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3:01-cv-763-J-21TJC

PHILLIP T. BREUER,

Plaintiff,

V.

JIM'S CONCRETE OF BREVARD, INC.,

Defendant.

ORDER

Filed herein is Plaintiff's Motion for Remand (Dkt. 5) and Defendant's Response (Dkt. 11) in opposition thereto. The Court has previously considered the issue presented — whether a case under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, filed in state court, can be removed to federal court — in *White v. Security and Surveillance, Inc.*, Case No. 3:97-cv-811-J-21B. In *White*, this Court issued an Order denying the plaintiff's motion for remand. In considering Plaintiff's Motion for Remand (Dkt. 5) in the instant case, the Court adopts the rationale from its Order issued in *White*. Accordingly, Plaintiff's Motion for Remand (Dkt. 5) is hereby **DENIED**.

DONE AND ORDERED, at Jacksonville, Florida, this 7th day of December, 2001.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

FOR ARGUMENT

(3)

Supreme Court, U.S.
FILED
FEB 14 2003
OFFICE OF THE CLERK

Case No. 02-337

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF ON THE MERITS FOR PETITIONER

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60 pp

QUESTIONS PRESENTED FOR REVIEW

Whether an action commenced in state court under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (the "FLSA"), can be removed by the defendant to a federal district court, even though the FLSA expressly provides that the case can be "maintained" in state court?

Whether the Eleventh Circuit's interpretation of the word "maintained" as used in the jurisdictional provisions of the FLSA conflicts with this Court's pronounced definition of the word "maintain" to be used when construing federal statutes?

Whether the conflict, disparity and deadlock of opinions between the Eleventh and First Circuits and the Eighth Circuit, and between dozens of district courts around the country, regarding whether FLSA actions commenced in state court are removable to federal court, warrants that this Court, as suggested by the Eleventh Circuit in its opinion below, grant this petition to resolve the question once and for all in order to bring uniformity to the federal courts, and eliminate widespread disparity between litigants in our federal system?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are as captioned and there are no other parties.

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OPINIONS AND ORDERS IN THE CASE

1. Opinion below; opinion of the United States Court of Appeals for the Eleventh Circuit, *Phillip T. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, filed June 5, 2002. Reprinted in the Appendix to Petition for Writ of Certiorari at 1a through 6a ("Pet. App. 1a-6a").

2. Judgment of the United States Court of Appeals for the Eleventh Circuit, *Phillip T. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, entered on July 5, 2002 (Pet. App. 7a)

3. Order of the United States District Court for the Middle District of Florida denying Petitioner/ Plaintiff's motion for remand, filed December 7, 2001, Case No. 3:01-cv-763-J- 21TJC (unreported) (Pet. App. 8a-20a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Eleventh Circuit filed its opinion below on June 5, 2002. No motion for rehearing or rehearing *en banc* was sought and, accordingly, the Eleventh Circuit entered its judgment as mandate on July 5, 2002. A petition for writ of certiorari was timely filed with the Court on September 3, 2002. This Court granted cetiorari on January 10, 2003.

STATUTORY PROVISIONS INVOLVED

The relevant substantive statutes involved in this case are as follows:

Section 16(b) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly

situated.

As originally enacted in 1938 and before subsequent amendments, section 16(b) provided:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

Section 16(c) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(c), provides in pertinent part:

> The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under

> this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this section owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary.

Section 1441 of 28 U.S.C., commonly referred to as the removal statute, provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

STATEMENT OF THE CASE

Petitioner Phillip Breuer commenced this action on June 21, 2001, in the Circuit Court in and for the Fourth Judicial Circuit, in and for Duval County, Florida. Breuer is a former employee of Respondent Jim's Concrete of Brevard, Inc. Breuer brought suit under the Fair Labor Standards Act seeking back wages, liquidated damages, prejudgment interest and attorneys' fees. Petitioner alleged that Jim's Concrete had violated the FLSA by failing for several years to pay him overtime compensation for hours he had worked in excess of forty hours per week.

On July 2, 2001, eleven days after this action was commenced in state court, Jim's Concrete filed a notice of removal to federal court. In late July, 2001, Breuer filed a timely motion to remand the case to state court. On December 7, 2001, the district court denied the motion to remand, concluding that removal of private enforcement actions is permitted under the FLSA. The district court, however, granted a motion by Breuer for certification to petition the circuit court to take an interlocutory appeal of the order denying remand pursuant to 28 U.S.C. § 1292(b).

On January 15, 2002, the Eleventh Circuit granted Breuer's petition for an interlocutory appeal. On June 5, 2002, the Eleventh Circuit Court of Appeals affirmed the decision of the district court.

Breuer filed a timely petition for writ of certiorari on September 3, 2002. This Court granted the petition on January 10, 2003.

SUMMARY OF THE ARGUMENT

I. This case is governed by the longstanding principle that the removal jurisdiction of the federal courts is to be narrowly construed. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). That rule of construction, grounded in the "[d]ue regard for the rightful independence of state governments," serves important interests of federalism.

II. Section 16(b) of the Fair Labor Standards Act provides that a private action to recover liability under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The phrase "may be maintained" should fairly be understood to mean that an employee who has brought an FLSA action in state court may in that court continue that action until final judgment. Since this is the interpretation of section 16(b) which narrows the removal jurisdiction of the federal courts, it is the interpretation mandated by the rule of construction in *Shamrock Oil*.

This is, moreover, decidedly the most plausible interpretation of the term "maintain" in the FLSA. Prior to the enactment of the FLSA, this Court had held that the meaning of "maintain" an action is different and broader than "bring" an action. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927). Removal assures the virtually immediate termination of an action in state court, and is thus inconsistent with this traditional meaning of maintain. It makes no sense to say of the instant case that petitioner was allowed to "maintain" this action in state court; the state court proceedings came to an abrupt end only eleven days after the complaint was filed.

The term maintain appeared in two different portions of

the original text of section 16(b). As enacted in 1938, section 16(b) also provided that an employee could "designate an agent or representative to maintain" an FLSA action on his or her behalf. Manifestly in this clause the word "maintain" means litigate to judgment. The same word presumptively had the same meaning in the earlier part of the same provision authorizing employees themselves to maintain an action in state court.

In 1947 the Administrator of the Wage and Hour Division concluded that the term "maintain" in section 16(b) precluded removal of such actions. This contemporaneous administrative interpretation of the FLSA is entitled to substantial weight.

The Administrator's interpretation of section 16(b) was grounded in part on his conclusion that permitting removal "would ordinarily greatly increase the employee's burden in bringing suit." As the Administrator correctly observed at the time, most claims under the FLSA were then quite small. In the years following adoption of the FLSA, most wage claims were under $250, and there were reported cases involving claims as small as $11.75. For such claimants the physical proximity of state courts, and the possibility of comparatively informal state forums such as small claims courts, were of great importance. Removal would often have required employees with quite modest claims to travel (with their attorneys and witnesses) considerable distances to federal court, and to litigate in a more formal and time-consuming manner.

III. In the 1948 revision of Title 28 Congress adopted section 1441(a), which provides that any state court action over which the federal courts would have had jurisdiction could be removed "[e]xcept as otherwise expressly provided by Act of Congress." The interpretation of the "otherwise-

provided" clause of section 1441(a) is also governed by the rule of construction in *Shamrock Oil.*

The court of appeals below assumed that the otherwise-provided clause required that any asserted removal-limitation statute must be framed in "unequivocal language." (Pet. App. 5a). But that is the interpretation of section 1441(a) which minimizes the number of statutes which could satisfy the otherwise-provided clause, and thus maximizes the removal jurisdiction of the federal courts. That is precisely the opposite of what is required by the federalism principles of *Shamrock Oil.*

Section 1441(a) should be construed to require only that any removal limitation in an Act of Congress be found in the text of the Act itself. That requirement is readily satisfied by section 16(b), since that limitation is grounded in the very language of section 16(b). Indeed, it was the Administrator's position even prior to the 1948 revision that "[t]he Congressional purpose to prevent removal of actions is evidenced by the express language of Section 16(b)." (Emphasis added).

Because the pre-1948 language of section 16(b) was sufficient to preclude removal, the issue raised by section 1441(a) is whether Congress in 1948 intended by adopting the otherwise-provided clause to broaden the removal jurisdiction of the federal courts. But, as this Court observed in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 9-10 (1951), an "important purpose [of the 1948 revision] was to limit removal from state courts." The detailed Reviser's Notes accompanying the 1948 revision detail each of the new limitations on removal, but make no mention of any expansion of removal to be brought about by the otherwise-provided clause.

ARGUMENT

I. STATUTES AFFECTING THE REMOVAL JURISDICTION OF THE FEDERAL COURTS SHOULD BE NARROWLY CONSTRUED

This case is governed by the longstanding principle that the removal jurisdiction of the federal courts is to be narrowly construed. That well-established rule of construction, which serves important principles of federalism, was articulated with particular force in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941):

> [T]he policy of the successive acts of Congress . . .is one calling for the strict construction of [removal] legislation. The power reserved to the states under the constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 202 U.S. 263, 270 [(1934)].

In *Syngenta Crop Protection, Inc. v. Henson*, 123 S.Ct. 366, 369-70 (2002), this Court relied on that rule that removal statutes "are to be strictly construed" in concluding that the All Writs Act cannot be used to remove actions from state courts. *See Holmes Group v. Vornado Air Circulation*, 122 S.Ct. 1889, 1894 (2002)(rejecting interpretation of 28 U.S.C. § 1331

because it would "expand the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments' that our cases addressing removal require. *See Shamrock Oil & Gas Corp. v. Sheets."); Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999)(Rehnquist, C.J., dissenting)(noting "this Court's practice of strictly construing removal . . . statutes.") This enduring principle of statutory construction has been repeatedly endorsed by ten circuits[1], and has been applied by the lower courts in literally hundreds of cases[2]. Over the course of the last century most disputes reaching this Court regarding the scope of removal jurisdiction have been resolved against removal. *People of State of Illinois v. Kerr-McGee Chem. Corp.*, 677 F. 2d 571, 576 n. 8 (7th Cir. 1982).

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Nichols v. Harbor Venture, Inc., 284 F. 3d 857, 861 (8th Cir. 2002); *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F. 3d 720, 723 (5th Cir. 2002); *Whitaker v. American Telecasting, Inc.*, 261 F. 3d 196, 201 (2d Cir. 2001); *Long v. Bando Mfg. of America, Inc.*, 201 F. 3d 754, 757 (6th Cir. 2000); *Danca v. Private Health Care Systems, Inc.*, 185 F. 3d 1, 4 (1st Cir. 1999); *University of South Alabama v. American Tobacco Co.*, 168 F. 3d 405, 411 (11th Cir. 1999); *Prize Frize, Inc. v. Matrix*, 167 F. 3d 1261, 1265 (9th Cir. 1999); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F. 3d 214, 217 (3d Cir. 1999); *Doe v. Allied-Signal, Inc.*, 985 F. 2d 908, 911 (7th Cir. 1993); *Fajen v. Foundation Reserve Ins. Co., Inc.*, 683 F. 2d 331, 333 (10th Cir. 1982).

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Many of these lower court cases are set out under key number 2 in the "Removal" portion of the various editions of the Federal Practice Digest. They can be accessed at www.westlaw.com in the following manner. Select federal cases after 1944, and click on the "custom digest" key. Insert the key number 334K2 in the appropriate box, then again select federal jurisdiction.

The rule requiring strict construction of removal statutes has several sources. It is, of course, a necessary consequence of the more general principle requiring a narrow construction of any statute conferring jurisdiction on the federal courts. *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 377 (1994) Congress, moreover, can ordinarily be presumed to have confidence in the ability and willingness of state courts to interpret and apply federal law in an impartial and competent manner, a conviction which would make removal unnecessary. That presumption can, of course, be overcome by explicit statutory language, but ambiguous terminology is simply insufficient to demonstrate a congressional decision to authorize removal of actions properly filed in state courts. In a few areas, such as civil rights, Congress has historically had concerns about the fairness of state courts. *Monroe v. Pape*, 365 U.S. 167 (1961). But no such special concerns are at issue in the instant case, since Congress especially and very deliberately authorized employees to bring FLSA actions in state courts, and section 1441(a) applies to all removal regardless of subject matter.

The abrupt removal from a state court of an action properly filed there works a serious intrusion on the prerogatives of the states and their judicial systems. This Court's habeas corpus decisions have long been animated by a concern to respect the ability of state judges to manage litigation in their courts. That solicitude is equally warranted where a party seeks, not merely to set aside a state court disposition, but to strip the state courts of the authority to decide a dispute at all. This case, too, is "a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

These considerations apply with particular force where removal will deny state courts the opportunity to decide state law claims. Actions over which federal courts would have

federal question jurisdiction often include supplemental state law claims. 28 U.S.C. § 1367. Many of the FLSA cases which defendants have sought to remove to federal court have involved one or more state law claims[3].

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Hesni v. Williams & Bochea, L.L.C., 2002 WL 373237 *1 (E.D.La.)(La. Rev. Stat. 23:631); *Ehle v. Williams & Boshea, L.L.C.*, 2002 WL 373271 *1 (E.D.La.)(La. Rev. Stat. 23:631); *Castillo v. Texas Can!*, 2002 WL 1733727 *1 (N.D.Tex.)(claims under Texas minimum wage and civil rights laws and under Texas state constitution); *Mincy v. Staff Leasing,L.P.*, 100 F.Supp. 1050, 1050 (D.Ariz. 2000)(violation of Ariz. Rev. Stat. § 23-353 and "other state law cause of action *quantum meruit*, breach of express and implied contract, and breach of the covenant of good faith and fair dealing"); *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1345 (M.D.Ala. 2000)("multiple state-law claims and one federal claim under the Fair labor Standards Act"); *Lopez v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 865, 865-66 (S.D.Tex. 2000)(action under Texas minimum wage law and for damages for unpaid wages); *Chapman v. 8th Judicial Juvenile Probation Board*, 22 F. Supp. 2d 583, 584 (E.D.Tex. 1998)(breach of oral contract agreement); *Lisai v. Chevron Stations, Inc.*, 1997 WL 694705 *1 (N.D.Tex.)(Texas Human Rights Act, Texas Labor Code, and claim for negligent entrustment); *Brown v. Luk, Inc.*, 1996 WL 280831 *1 (N.D.N.Y. 1996)("'various' provisions of New York's Labor Law"); *Nesbitt v. Bun Baskett, Inc.*, 780 F.Supp. 1151, 1151 (W.D.Mich. 1991)(breach of implied employment contract); *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F.Supp. 989, 990 (E.D.Mo. 1991)(Missouri Civil Rights Act and state law claims for wrongful discharge and intentional infliction of emotional distress); *Isaac v. Pflaumer & Sons, Inc.*, 1990 WL 102808 *1 (E.D.Pa.)(Pennsylvania Wage Payment and Collection Law); *Spieth v. R & B Appliance Parts*, 1989 WL 56486 *1 (D.Ariz.)(unstated allegation of "violations of state law"); *Bintrim v. Bruce-Merilees Electric Co.*, 520 F. Supp. 1026, 1026 (W.D.Pa. 1981)(common law breach of contract and quantum meruit); *Rolon v. Fleximore Company of Puerto Rico, Inc.*, 216 F. Supp. 954, 954 (D.P.R. 1963)(claim under Puerto Rican minimum wage provisions).

II. SECTION 16(b) OF THE ORIGINAL 1938 VERSION OF THE FAIR LABOR STANDARDS ACT DID NOT PERMIT REMOVAL OF AN ENFORCEMENT ACTION IN STATE COURT

Section 16(b) provides that an "[a]ction to recover . . . liability [under the Act] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). In concluding that section 16(b) permits removal, the First Circuit has objected that the term maintain is "ambiguous." *Cosme Nieves v. Deshler*, 786 F. 2d 445,451 (1st Cir. 1986). This objection stands on its head the federalist principles of *Shamrock Oil*. If a statute affecting the removal jurisdiction of the federal courts is indeed ambiguous, that statute must be construed *against*, not in favor of, removal.

The traditional meaning of the phrase "maintain an action" is "to prosecute [the action] to final judgment." *Apple v. Shulman Publications, Inc.*, 65 F.Supp. 677, 677 (D.N.J. 1943) Several years before the enactment of the FLSA, this Court noted that this was indeed the usual meaning of the phrase. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 375 (1933)(*quoting Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927)).

This established legal usage is consistent with the relevant non-legal usage of the verb "maintain." That word is utilized for the very purpose of indicating the continuation of a state of affairs or activity, in phrases like "maintain one's composure", "maintain appearances", "maintain a minimum

balance in a bank account", "maintain order", "maintain the status quo", or "maintain an apartment." A helmsman commanded to "maintain a course due west" would understand that he or she was to continue until further notice to sail to the west, not simply to begin towards the west and then veer off in any other direction. A pilot directed by air traffic controllers to "climb to and maintain an altitude of five thousand feet" would remain at that height until further instruction.

This meaning of the word "maintain" was of controlling importance in *Smallwood v. Gallardo,* 275 U.S. 56 (1927). In March 1927 Congress had enacted a statute which provided that no action "shall be maintained in the District Court of the United States for P[ue]rto Rico" to restrain collection of taxes under the laws of Puerto Rico 275 U.S. at 61. The question in *Smallwood* was whether that congressional enactment required the dismissal of actions that had been commenced prior to the March 1927 date of enactment. If "maintained" had meant "commenced", those pre-1927 actions would have remained proper, because the statute would in turn have meant only that "no action shall be commenced in the District Court," a limitation inapplicable to previously filed proceedings. But if "maintained" meant "continued", the statute mandated dismissal of earlier filed lawsuits. This Court rejected the contention that "maintain" meant only commence an action, insisting it was quite clear that to "maintain an action" was to continue it to judgment:

> Apart from a natural inclination to read them more narrowly, there would seem to be no doubt that the words of the statute covered these cases. To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun. . . . To apply the statute to present suits is . . . but to take it literally . . . It simply makes it plain that these [pre-Act] cases are not excepted from the well known general rule against injunctions [against the collection of taxes.]

275 U.S. 61-62 (Emphasis added).

If, as in *Smallwood* and *George Moore Ice Cream* the term "maintain" in section 16(b) means continue to judgment, then removal of a private FLSA action would clearly be impermissible. A statutory right to "continue . . . a suit" in state court would be manifestly inconsistent with removal. Removal necessarily guarantees the very opposite of continuation; removal must ordinarily be requested within a few weeks of the filing of an action, and the request automatically brings the state court proceeding to an abrupt end[4]. In the instant case the state court action was filed on June 21, 2001, and came to an abrupt and permanent end on July 2, 2001, only eleven days later, when the notice of removal was filed. That result would clearly be improper if the term "maintain" in section 16(b) has its usual meaning.

The Administrator of the Wage and Hour Division, to whom Congress in 1938 assigned responsibility for administering the Fair Labor Standards Act, concluded for that reason that section 16(b) does not permit removal of an FLSA action, relying in particular on this Court's interpretation of the

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At the time a petition for removal had to be filed before the time for filing an answer. 28 U.S.C. § 72 (1940). Once the petition was filed, it was "the duty of the State court to . . . proceed no further in such suit." *Id.* Under current law a notice of removal must ordinarily be filed within thirty days of the service of the complaint. 28 U.S.C. § 1446(b). Filing of that notice brings the state proceedings to an end. 28 U.S.C. § 1446(d).

term "maintain" in *Smallwood* and *George Moore Ice Cream*:

> [It is] the Administrator's view that both the policy underlying employee suits and the specific language of the statute contemplate not only that an employee may bring his action in a State court but also that he may maintain the action to final judgment in the State court without removal to a Federal district court.[5]

Indeed, the Administrator insisted that "[t]he Congressional purpose to prevent removal of actions is evidenced by the express language of Section 16(b)"[6].

Two provisions of the 1938 original version of the FLSA make it particularly clear that the Administrator's interpretation was correct. First, as originally enacted the relevant sentence in section 16(b) used the term "maintain" in two separate clauses:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

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5 Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p.5 (Emphasis added). We have lodged copies of this brief with the Clerk of the Court.

6 *Id.* at 7 (emphasis added).

52 Stat. 1069[7]. Undeniably the word "maintain" in the second clause meant "litigate to judgment"; assuredly Congress did not intend that a designated agent or representative could be authorized only to file an action, and would thereafter be compelled to withdraw and abandon the suit. When Congress repeatedly utilizes the same word in a statute, it usually intends that the word have the same meaning throughout. It would be most illogical and unlikely for Congress in a single sentence to have used the identical word with two quite different intended meanings.

Second, in describing in section 12(b) of the Act the authority of the Chief of the Children's Bureau to seek injunctive relief to prevent oppressive child labor, Congress provided that the Chief could "bring" an action to seek such relief.[8] An action brought by the government under section 12(b) in state court clearly would have been removable. If section 16(b) had similarly provided only that employees could bring enforcement actions, rather than maintain them, removal of such private actions would clearly have been permissible. But the Congress which framed the FLSA acted quite deliberately when it guaranteed employees a right to "maintain" an enforcement action in state court, rather than merely to "bring" such an action in state court.

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7 The second clause was subsequently repealed.

8 "The Chief of the Children's Bureau of the Department of Labor . . . shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor . . . ." 52 Stat. 1067 (Emphasis added).

The difference between "maintain" and "bring" is of even greater significance under the FLSA in its current form. In 1974 Congress amended the FLSA to permit the Secretary of Labor to "bring"--not "maintain"--in any court of competent jurisdiction an action for unpaid wages and liquidated damages. 29 U.S.C. § 216(c). Because the statutory authorization for such actions by the Secretary differs from the language of section 216(b), a section 216(c) action brought by the Secretary in state court (unlike a private action) can be removed to federal court.

The commencement of such an action by the Secretary terminates the right of an employee "to bring" an action under section 216(b), 29 U.S. C. § 216(c), but not to "maintain" such an action; thus the filing of an action by the Secretary bars new private actions, but does not affect actions already pending. Similarly, an action by the Secretary under section 216(c) terminates the right of an employee under section 216(b) "to become" (but not, more broadly, "to be") a plaintiff in such an action; therefore previously filed private class actions may also continue unaffected. There is thus a critical difference between the current language of section 216 and the terms of the statute involved in *Smallwood;* because section 216(c), unlike section 216(b), does not use the word "maintain", it does not affect pending litigation. If section 216(b) had instead provided only that employees could "bring" enforcement actions, the commencement of litigation by the Secretary would wipe out pending private actions, a result Congress clearly did not intend[9].

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9 *Donovan v. University of Texas at El Paso,* 643 F. 2d 1201, 1207 (5th Cir. 1981)("previously filed private litigation by employees are not affected"); S. Rep. 145, 87th Cong., 1st Sess., 1961 U.S. Code and Congressional and Administrative News, 1620, 1658-59 ("Under these amendments . . . filing of a complaint by the Secretary, pursuant to the new authority given him . . . terminates the rights of individuals to later file suit for compensation and liquidated damages under 16(b).")(Emphasis added); Conf. Rep. No. 327, May 2, 1961.

It is also evident from other legislation adopted at the same time as the original FLSA that Congress in 1938 acted quite deliberately when it used in section 16(b) the term "maintain", rather than a word which would have conveyed only a right to begin (but not necessarily pursue) an action in state court. During the month immediately preceding the June 1938 enactment of the FLSA, Congress enacted several statutes which repeatedly and purposely used narrower terminology that authorized only the initiation, but not necessarily the maintenance, of litigation. This contemporaneous legislation contained numerous provisions stating that a litigant could "file" a petition or action[10], "institute proceedings"[11], or "apply for enforcement"[12], that an action could be "brought"[13] or "commenced"[14], or that courts would have jurisdiction[15] or "concurrent jurisdiction."[16] In contrast, the use of the term "maintained" in section 16(b) is both unique and highly

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10 52 Stat. 1100, 1055-56, 840-933.

11 52 Stat. 849, § 11(e).

12 52 Stat. 1025.

13 52 Stat. 1076, 849 § 11(d).

14 52 Stat. 849 § 11(c).

15 52 Stat. 1043.

16 52 Stat. 870.

significant[17]. This difference in terminology is all the more telling because the conference committee which drafted section 16(b) deliberately rejected the Senate version of the bill, which would have provided only that state and federal courts would have "concurrent jurisdiction" over employee lawsuits[18].

This distinct and purposeful choice of language pervades the United States Code. When Congress expressly authorizes civil litigation, it usually uses terminology which refers only to the initiation of the litigation--e.g., "brought", "commenced", or "filed"--or which states simply which courts will have jurisdiction. Utilization of the terms "maintain" or "maintained"

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17 One district court observed in this regard:

> "Why did not Congress use the word "begun," or "filed", or "commenced" or "instituted", if Congress meant no more? They are simple words, words in daily use, as simple as "maintained." It did not use them."

Fredman v. Foley Bros., 50 F.Supp. 161, 162 (W.D.Mo. 1943).

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S. 2475, 75th Cong., 2d sess., 81 Cong. Rec. 7957 (1937):

> "The district courts of the United States shall have jurisdiction of violations of this act or the regulations or orders thereunder, and, concurrently with State and territorial Courts, of all suits in equity and action at law brought to enforce any liability or duty created by, or to enjoin any violation of, this act or the regulations or orders thereunder . . . "

The original House bill had a similar provision. H.R. 7200; see 81 Cong. Rec. 4961, 4998 (1937).

with regard to civil actions is far less common, and this distinction is presumptively entirely deliberate. When Congress has wanted not only to bar the commencement of certain types of actions, but also to terminate any pending such litigation, it has commanded, in language like that in *Smallwood,* that no such action "may be maintained", 15 U.S.C. § 77p(d(1)(A), or that "[n]o [such] action . . . shall be brought or maintained in any court." 7 U.S.C. § 623(a)(Emphasis added); see 50 U.S.C. App. § 24 (certain actions may not be "instituted or maintained"); 2 8 U .S.C. § § 6 673(a)(authorizing s anctions i f action has been "instituted or maintained . . . for delay"), 6673(b)(same)[19]. Outside the context of civil litigation, Congress has repeatedly used the word "maintain" to refer to ongoing action.[20]

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Similarly, under Rule 11 of the Federal Rules of Civil Procedure an attorney or unrepresented party is deemed to be representing that a pleading, motion or other paper "is not being presented or maintained for any improper purpose."

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E.g., 5 U.S.C. § 552a(b)(1)(certain confidential records may be disclosed to certain "officers and employees of the agency which maintains the record"); 12 U.S.C. §§ 1782(d)(2)(A)(i)(limiting liability for credit union which "maintains procedures reasonably adapted to avoid any inadvertent error"), 2279aa-3(c)(14)(Federal Agricultural Mortgage Corporation authorized to "establish, acquire and maintain affiliates"); 15 U.S.C. § 1681a (regulating consumer reporting agency if it "compiles and maintains files on consumers on a nationwide basis"); 20 U.S.C. § 5812(1)B)(iii)(congressionally declared goal of assuring that school children "receive the nutrition, physical activity experiences, and health care needed . . . to maintain the mental alertness necessary to be prepared to learn"); 28 U.S.C. § 1827 (guidelines for selection of court interpreters to "ensure that the highest standards of accuracy are maintained in all judicial

The Administrator based his 1947 interpretation of section 16(b) in part on an intensely practical understanding of the likely consequences, particularly in the era when the FLSA was enacted, of permitting removal:

> [T]o permit removal of employee suits to the Federal courts at the instance of employers would ordinarily greatly increase the employee's burden in bringing suit. Normally the amount an employee seeks to recover in an action under Section 16(b) is comparatively small. If the employer can add to the employee's burden of proving his claim the expense of travel for himself, his lawyers and witnesses to the seat of the Federal court, and the expense of subsistence there during the course of the trial, the employee will often forego his claim rather than incur such expense.[21]

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proceedings"); 30 U.S.C. § 1265 (where necessary to prevent deterioration of certain topsoil, steps to be taken to "maintain a successful cover by quick growing plant"); 33 U.S.C. § 2005 (certain vessels to "maintain a proper look-out by sight and hearing"); 42 U.S.C. §§ 654 (state to "maintain a full record" of certain collections and disbursements), 1395ff(c)(1)(electronic database regarding certain Social Security matters to be "maintained"), 2153(a)(certain agreements to contain "safeguards [that] will be maintained with respect to all nuclear materials"), 8002 ("personal assistance" defined to include aid in "grooming, dressing and other activities which maintain personal appearance and hygiene.")

21 Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p. 6.

The FLSA initially authorized a minimum wage of only 25 cents per hour[22], and many actions under the FLSA were indeed for quite modest sums. In the early years of the FLSA a majority of the wage claims in private actions appear to have been for less than $250[23]; the smallest reported claim was for $11.75[24]. The

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22 52 Stat. 1062.

23 *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 956 (D.N.J. 1940)($119.83); *Williams v. Atlantic Coast Line R.R.Co.*, 1 Wage & Hour Cas. 289, 295 (E.D.N.C. 1940)(wage claims of $64.00, $62.40, $57.60, and $41.60); *Wigham v. Tucker Oil Co.*, 1 Wage & Hour Cas. 540, 542 (N.D.Tex. 1941)(wage claim of $85.62); *Muldowney v. Seaberg Elevator Co.*, 1 Wage & Hour Cas. 605, 613 (E.D.N.Y. 1941)($213.90); *Thompson v. Daugherty*, 1 Wage & Hour Cas. 679, 679 (D.Md. 1941)($252); *West v. Smokey Mtns. Stages Inc.*, 1 Wage & Hour Cas. 698, 698 (N.D.Ga. 1941)($166.40); *Drake v. Hirsch*, 1 Wage & Hour Cas. 702, 702 (N.D.Ga. 1941)($83.07); *Angel v. Dayton Veneer & Lumber Mills*, 1 Wage & Hour Cas. 718, 719 (N.D.Ga. 1941)(of 26 individual claims, 18 were under $250 and 4 were $100); *Magann v. Long's Baggage Transfer Co.*, 1 Wage & Hour Cas. 720, 727 (W.D.Va. 1941)($199.60); *Roberts v. Hoarel*, 1 Wage & Hour Cas. 737, 738 (N.D.Tex. 1941)($29.50); *Nelson v. Southern Ice Co.*, 1 Wage & Hour Cas. 787, 788 (N.D.Tex. 1941)($116); *Mortenson v. Western Light & Telegraph*, 1 Wage & Hour Cas. 829, 832 (S.D.Iowa 1941)($43.77); *Allen v. Moe*, 1 Wage & Hour Cas. 869, 871 (D.Idaho 1942)($206.80); *Littleton v. White Motor Co.*, 1 Wage & Hour Cas. 913, 917 (N.D.Tex. 1941)($167); *McLendon v. Bewley Mills*, 1 Wage & Hour Cas. 934, 937 (N.D.Tex. 1940)($116); *Whitson v. Wexler*, 1 Wage & Hour Cas. 1055, 1055 (Tenn. Chancery Ct. 1941)(claims of $90.25 and $11.75); *Boylan v. Liden Mfg. Co.*, 1 Wage & Hour Cas. 1063, 1066 (Mich. Circuit Ct. 1941)($135.36); *Higgins v. Carr Brothers Co.*, 1 Wage & Hour Cas. 1082, 1082 (Maine Superior Ct. 1941)($31.70); *Wagner v. Estate of Abe Feld*, 1 Wage & Hour Cas. 1097, 1100 (Indiana Superior Ct. 1941)($247.12); *Copper v. Gas Corp. of Michigan*, 1 Wage & Hour

FLSA was enacted during the Depression, when many of the covered workers were in dire economic straits.

Although state courts were no further from a private plaintiff than the local county seat, federal courts could easily be a hundred miles away. In an era long before the construction of the interstate highway system, traveling that distance to federal court could well be time-consuming and expensive. In 1938, moreover, a comparatively greater proportion of the American population lived in rural areas often far from the major cities in which federal district judges were necessarily concentrated. At that time there were only about 130 federal district court judges[25]; a dozen states had only a single federal judge[26]. Although state courts were available in every one of the nation's 3000 counties, in the overwhelming majority of those counties there was no federal courthouse. Certainly when the FLSA was first enacted, a substantial portion of all private actions under

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Cas. 1119, 1126 (Mich. Superior Ct. 1941)($156.80); *Silverman v. Ballaban,* 1 Wage & Hour Cas. 1206, 1207 (N.Y. City Ct. 1941)($41.61). Successful claimants under the FLSA would also have been entitled to liquidated damages in an amount equal to the wages awarded.

During this era the jurisdictional amount in diversity cases was $3,000.

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Whitson v. Wexler, 1 Wage & Hour Cas. 1055, 1055 (Tenn. Chancery Ct. 1941).

25 28 U.S.C. § 1 and pt. 5 (1940).

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Colorado, Delaware, Idaho, Kansas, Maine, Nevada, New Hampshire, Rhode Island, South Dakota, Utah, Vermont and Wyoming.

that statute were in fact brought in state rather than federal court[27].

At that time litigation in federal courts themselves could be comparatively slow and awkward. If a district court had several divisions, the district judges would often travel from division to division, holding court in a particular district only a few times a year[28]. The formalities of federal court assuredly required skilled legal representation and a knowledge of federal procedures that might well be unfamiliar to an attorney whose usual practice was limited to state court in a remote rural county. An employee able to pursue litigation in state court, on the other hand, might well be able to proceed in small claims court[29] or present his or her claims to a local justice of the peace[30]. These

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A review of the private enforcement actions reported in volume 1 of Wage and Hour Cases for the years 1940 and 1941 indicates that about one-third of those private FLSA actions were brought in state court. Private actions in state court, particularly in a small claims court or a justice of the peace court, were comparatively unlikely to result in reported opinions.

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In the Fifth Division of the Minnesota District Court, to which the action in *Johnson* was removed, there were only two terms of court a year, beginning on the first Tuesday in May and the first Tuesday in December. 28 U.S.C. § 169 (1940).

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E.g., Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956, 956 (D.N.J. 1940).

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E.g., Wingate v. General Auto Parts Co., 40 F.Supp. 364, 365 (W.D.Mo. 1941).

were practical problems with which every member of the 75th Congress would have been familiar.

In *Johnson v. Butler Bros.*, 162 F. 2d 87 (8th Cir. 1947), for example, the disputed wages totaled $385.26. 162 F. 2d at 88. The plaintiff brought suit in the district court for Crow Wing County, a rural area in central Minnesota, and retained an attorney from the county seat, Brainerd. The defendant retained a law firm in St. Paul, over a hundred miles southeast of Brainerd, which then removed the case to the federal court in Duluth, an equal distance from both Brainerd and St. Paul. *Johnson v. Butler Bros.*, 65 F. Supp. 277 (1946)[31]. The appellate panel which ordered the case remanded was undoubtedly aware of the burden that removal had imposed on a claimant seeking only a modest award.

Federal district judges of this era, who well understood the serious economic problem that removal could pose for wage earners, often referred specifically to that problem in concluding that Congress would not have intended to permit removal of FLSA claims:

> The amounts involved usually are small. The places in which federal courts are held are few. They are only to be found in the larger cities. If it was not intended that state courts should have jurisdiction of these cases, then congress made this act of slight value to working men, who might easily bring suit in a justice court or other state court in the neighborhood in which they

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The same St. Paul law firm removed another FLSA action that had been brought in Crow Wing County. *Koskala v. Butler Bros., 65* F.Supp. 276, 276 (D.Minn. 1946).

> live, but who, if they had to go to some distant city to prosecute the case, would, in effect, be prohibited from seeking any remedy.

Wingate v. General Auto Parts Co., 40 F. Supp. 364, 365 (W.D. Mo. 1941); *see Tobin v. Hercules Powder Co.*, 63 F. Supp. 434, 435 (D.Del. 1945); *Fredman v. Foley Bros.*, 50 F.Supp. 161, 162 (W.D.Mo. 1943); *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 455 (D.Neb. 1942). Prior to 1948 "the great majority of district courts . . . that considered this question concluded that the Removal Statute d[id] not apply [to FLSA actions.]"[32]

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Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p. 6.

In the first decade after the enactment of the FLSA a large number of district courts concluded that actions under section 16(b) could not be removed. *Maloy v. Friedman*, 80 F.Supp. 290 (N.D.Ohio 1948); *Melching v. Armour & Co.*, 6 Wage & Hour Cas. 760 (W.D.Mo. 1947); *McGuire v. North American Aviation*, 69 F.Supp. 917 (W.D.Mo. 1946); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241 (E.D.Mo. 1946); *Crouse v. North American Aviation, Inc. of Kansas, 68* F.Supp. 934 (W.D.Mo. 1946); *Smith v. Day & Zimmerman, Inc.*, 65 F.Supp. 209 (S.D.Iowa 1946); *Weaver v. Quaker Oats Co.*, 6 Wage & Hour Cas. 570 (N.D.Ohio 1946); *McGuire v. North American Aviation of Kansas*, 6 Wage & Hour Cas. 524 (W.D.Mo. 1946); *Cikra v. Pittsburgh Plate Glass Co.*, 6 Wage & Hour Cas. 113 (N.D.Ohio 1946); *Apple v. Shulman Publications*, 65 F.Supp. 677, 677 (D.N.J. 1943)(disapproval of removal the "majority" view); *Wright v. Long*, 65 F. Supp. 279 (W.D.Mo. 1944);*Tobin v. Hercules Powder Co.*, 63 F. Supp. 434 (D.Del. 1945); *Steiner v. Pleasantville Constructors*, 59 F.Supp. 1011 (S.D.N.Y. 1944); *Sheridan v. Leitner*, 59 F.Supp. 1011 (S.D.N.Y. 1944); *Brockway v. Long, 55* F.Supp. 79 (W.D.Mo. 1944); *Brantley v. Augusta Ice & Coal Co., 52* F.Supp. 158 (S.D.Ga. 1943); *Garner v.*

III. THE 1948 REVISION OF THE JUDICIAL CODE DID NOT REPEAL THE BAR TO REMOVAL IN SECTION 16(b) OF THE FLSA

In the 1948 revision of Title 28, Congress recast the first sentence of what then became section 1441(a) to read in part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . .

The prevailing pre-1948 interpretation of the FLSA was at the least that section 16(b) did indeed "otherwise . . . provid[e]." The question is whether by using the adverb "expressly" in the otherwise-provided clause Congress intended

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Mengel Co., 50 F.Supp. 794 (W.D.Ky. 1943); *Fredman v. Foley Bros., 50* F.Supp. 161 (W.D.Mo. 1943); *Duval v. Portes,* 51 F.Supp. 967 (E.D.N.Y. 1942); *Booth v. Montgomery Ward & Co.,* 44 F.Supp. 451 (D.Neb. 1942); *Phillips v. Pucci,* 43 F.Supp. 253 (W.D.Mo. 1942); *Garrity v. Iowa-Nebraska L. & P. Co.,* 1 Wage & Hour Cas. 926 (D.Neb. 1941); *Barron v. F.H.E. Oil Co.,* 1 Wage & Hour Cas. 764 (W.D.Tex. 1941); *Kuligowski v. Hart,* 43 F.Supp. 207 (N.D.Ohio 1941); *Wingate v. General Auto Parts Co.,* 40 F. Supp. 364 (W.D.Mo. 1941); *Stewart v. Hickman,* 36 F.Supp. 861 (W.D.Mo. 1941).

See also *Carter v. Hill & Hill Truck Line, Inc.,* 259 F.Supp. 429, 429 (S.D.Texas 1966)(prior to 1948 "the majority opinion" was that section 16(b) cases could not be removed.") The decision in *Brantley* cites several additional unreported cases.

to bring about a significant change in the law, authorizing removal of claims that had been non-removable prior to 1948.

The court of appeals below insisted that the otherwise-provided clause sets an exceedingly demanding standard, which can be satisfied only by "unequivocal language." (Pet. App. 5a). But the meaning of section 1441(a), like the meaning of section 16(b), is governed by the principles of *Shamrock Oil.* The otherwise-provided clause, like any other provision affecting removal, must be construed in a manner that narrows the removal jurisdiction of the federal courts. *Shamrock Oil* thus commands that in choosing among the possible interpretations of the otherwise-provided clause, the courts should select the construction that sets the least demanding standard for determining when another statute (like section 16(b)) "otherwise provides."

A. Neither The Text Nor The Legislative History of The "Otherwise-Provided" Clause Support The Conclusion That Such Clause Applies Only To Statutes Which Use The Word "Remove"

The language of the otherwise-provided clause cannot fairly be read to permit only the interpretation, suggested by the court below, that any removal-limiting statute must actually use the word "removal" or contain other absolutely "unequivocal language." Section 1441(a) requires only that a removal-limiting statute "expressly provid[e]" that an action may not be removed; section 1441(a) does not insist that such a statute "expressly" use the very word "removal." If a statute provided that actions under it "may be litigated to final judgment in any court of competent jurisdiction", such language would undeniably be inconsistent with removal. And that is precisely the meaning of section 16(b).

"Expressly," like "express", is susceptible of at least two distinct meanings. (1) A requirement that a statutory command or direction be express may mean only that such command or direction could be found in the text of the statute, as opposed to some meaning implied only from the structure or presumed purpose of the law. That usage of the word "express" is reflected in the distinction between an express and an implied contract. Courts routinely conclude that an express contract exists even though there may be disagreement about its meaning, or even a colorable argument (rejected by the court) that there was in fact no such contract. (2) A requirement that a command or direction be "express" could also be understood to demand a particular degree of clarity and/or specificity, e.g. clear, reasonably clear, very clear, or utterly unambiguous. Dictionaries commonly note the existence of both of these meanings[33].

The distinction between these two usages is illustrated by the terms of Rule 11 of the Federal Rules of Civil Procedure, which provides in part:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record
> . . . .

Rule 11 could be said to expressly require (in the first, "textual", sense) that briefs or requests for admissions be signed, since these can fairly be understood to be within the meaning of the

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Compare 1 Compact Oxford English Dictionary, vol. E, p. 445 (1971)(express means "[e]xpressed and not merely implied") *with id.* (express means "explicit); *compare* Ballentine's Law Dictionary, p. 441 (1969)(express means "[s]tated . . . declared, not left to implication") *with id.* (express means "explicit, clear").

general phrase "other paper." But in the second sense (especial specificity), it might be asserted that the only documents which Rule 11 expressly requires be signed are pleadings and written motions. In this context, at least, the textual interpretation of "expressly" would probably be the more common usage.

In light of the rule of statutory interpretation in *Shamrock Oil*, the otherwise-provided clause in section 1441(a) should be construed to require only that the bar to removal in an "Act of Congress" be grounded in the actual text of that Act. Section 16(b) of the Fair Labor Standards Act easily satisfies that requirement. The conclusion that the original 1938 Act did not permit removal rests squarely on the language of section 16(b) itself, which authorizes a plaintiff to "maintain" an action in state court, a term which this Court prior to 1938 had twice construed to mean the continuation to judgment (not merely the filing) of an action. Even if the term "expressly" is construed to require a particular degree of clarity in a removal-limiting statute, that would not mean that such a statute must actually utilize the word "removal."

The legislative history of the 1948 revision of Title 28 is entirely devoid of any assertion that section 1441(a) would expand federal removal jurisdiction or to reverse the rule of construction in *Shamrock Oil.* Indeed, although the authoritative Reviser's Notes included with the House Report meticulously catalogued and explained hundreds of often quite minor alterations in the law brought about by the revision, the otherwise-provided clause is not mentioned in the Reviser's Notes at all. The otherwise-provided clause in section 1441(a) occasioned no such comment because it had no substantive consequences, and was not intended to permit the removal of previously non-removable actions.

Rather, the otherwise-provided clause merely resolved

an awkward problem in the prior language of Title 28. Before 1948 the first two sentences of section 71 authorized removal in general terms that contained no exceptions:

> Any suit of a civil nature . . . under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . in any State court, may be removed by the defendant or defendants therein . . . . Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction . . . in any State court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State.

28 U.S.C. § 71 (1940)(Emphasis added). This language was derived from the removal provision enacted in 1874, at a time when federal law apparently contained no contrary provisions limiting removal. 18 Stat. pt. 3, 470. But in the succeeding decades Congress had adopted several such limitations, including the Fair Labor Standards Act. These post-1874 laws restricting removal were in some tension with the facially unrestricted right of removal in the original 1874 language.

The otherwise-provided clause resolved this technical problem by providing an "except[ion]" to the earlier right to remove "any" action within the original jurisdiction of the district courts. The clause did not alter the removability of any then-existing class of cases, and thus occasioned no comment by the Reviser. The purpose of the otherwise-provided clause was merely to confirm the non-removability of actions already subject to the limitation of post-1874 statutes like the FLSA.

It is unlikely that Congress, in a clause whose basic purpose was to codify certain existing *restrictions* on removability, intended through the use of the word "expressly" to actually *expand* removal. The far more plausible reading of section 1441(a) is that the term "expressly" was intended to limit this exception to statutes like the FLSA with a text-based limitation, and to assure that the otherwise-provided clause would not become a basis for reading into other statutes new, non-textual restrictions on removal. The term "expressly", like the otherwise-provided clause itself, was intended to codify and rationalize, not to alter, the legal status quo.

A number of lower courts have insisted that the otherwise-provided clause in section 1441(a) can only be satisfied by a statute which refers to "removal" in haec verba[34]. See Respondent's Brief In Opposition, p. 5 ("the FLSA does not even mention the term removal.") Unless the word "removal" is used, they suggest, an Act of Congress cannot be said to "expressly" bar removal. On this view a statute would not expressly bar removal even if it provided, for example, that a particular type of action "may be filed and litigated to final judgment in state court." If that is indeed the meaning of the otherwise-provided clause, it would affect pre-1948 statutes, and would render removable previously non-removable claims, including claims under the FLSA.

Section 1441(a) should not, however, be interpreted to authorize removal of previously non-removable claims solely because the pre-1948 limitation on removal did not use the term "remove." There is simply no evidence that Congress intended the otherwise-provided clause to bring about any change at all

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E.g. Hill v. Moss-American, Inc., 309 F.Supp. 1175, 1178 (N.D.Miss. 1970)(FLSA cannot satisfy the new standard in section 1441(a) because "[n]o mention of removal is made in the Act itself.")

regarding which then-existing claims could be removed. Absent a clear indication to the contrary, the otherwise-provided clause, like all laws affecting removal, should not be construed to have expanded the removal jurisdiction of the federal district courts.

B. Such An Interpretation Of The Otherwise-Provided Clause Would Be Inconsistent With The 1948 Revision

Neither the text nor the legislative history of the 1948 revision of Title 28 demonstrate any intent on the part of Congress to increase the removability of actions commenced in state court. To the contrary, the amendments embodied in that 1948 law were clearly intended to impose additional restrictions on removal. The "otherwise provided" clause in section 1441(a) cannot fairly be understood to have had a contrary purpose.

Prior to 1948 Title 28 had authorized removal of state court actions against out-of-state defendants, despite the absence of complete diversity, if an out-of-state defendant could show "that from prejudice or local influence he will not be able to obtain justice in such State court." 28 U.S.C. § 71 (1940). This provision was deliberately omitted from section 1441. The Reviser's Note explained:

> All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and Reconstruction period, have no place in the jurisdiction of a nation since united by three wars against foreign powers.

28 U.S.C.A. § 1441, Reviser's Note.

Second, prior to 1948 an action involving less than complete diversity could also be removed if it contained a separate "controversy which is wholly between citizens of different states." 28 U.S.C. § 71 (1940). The 1948 revision replaced the term "controversy" with a requirement that a case involve "a separate and independent claim or cause of action." 28 U.S.C. § 1441(c). Again, the Reviser's Note explained that this too would reduce the number of actions that could be removed:

> The [pre-1948] language has occasioned much confusion. . . . Subsection (c) permits removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of the United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation.

28 U.S.C. § 1441, Reviser's Note. This Court observed in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 9-10 (1951), that an "important purpose [of the 1948 revision] was to limit removal from state courts." See 341 U.S. at 10 ("The Congress, in the revision, carried out its purpose to abridge the right of removal.")

Third, although federal law had generally prohibited removal of certain actions against railroads or common carriers, prior to 1948 removal had frequently been permitted if the defendant was in receivership or bankruptcy, because of a separate provision of Title 28 authorizing removal of actions against court officers. *Compare* 28 U.S.C. § 71 (1940) *with* 28 U.S.C. § 76 (1940). In the 1948 revision, additional language was included in the new section 1445 to forbid the removal of

such actions:

> The words "or its receivers or trustees" were inserted into both subsections to make clear that nonremovable actions against a carrier do not become removable under section 1442 of this title when filed against court receivers or trustees. . . . The cases are in conflict as to whether [under old section 76] the case becomes removable when the carrier is in receivership or undergoing reorganization. The revised section [1445] resolves the conflict by denying the right of removal to receivers and trustees where it would be nonexistent if the carrier were the party defendant.

28 U.S.C. § 1445, Reviser's Note.

In light of the highly specific and meticulous manner in which Congress acted in 1948 where it did choose to alter existing law, it is highly unlikely that the mere inclusion of the word "expressly" in the otherwise-provided clause was intended to bring about any such change. Where Congress wanted to alter the removability of a class of cases, it did so with great particularity, identifying precisely the types of cases whose removability would be altered. Any change that would have been occasioned by use of the term "expressly" would not have been limited to or focused on some particular type of civil action, but could have applied to an indeterminate number of other federal statutes. Its impact could have been understood only by reviewing the entire corpus of the United States Code as it stood in 1948, and might have affected any number of distinct provisions. If, on the other hand, Congress had specifically wished to permit removal of FLSA actions, it would undoubtedly have referred with particularity to actions under that statute, as it did in the other removal-affecting provisions of

the 1948 revision.

One of the avowed purposes of the amendments to section 1441 was to reduce the confusion that had existed under the pre-1948 statutory language. If, however, the term "expressly" had indeed created a new requirement for removal-limiting statutes, particularly existing statutes, it would have introduced a whole new element of confusion into removal litigation. In light of the longstanding congressional practice of narrowing statutory authorization of removal, a practice reflected in several explicit 1948 amendments to Title 28, inclusion of the term "expressly" in the otherwise-provided clause should not be construed as creating a new, open-ended basis for removal.

The authoritative Reviser's Notes meticulously detail and explain every change in the law, however minor, made by the 1948 recodification, including the new provisions limiting removal. But those Notes contain absolutely no reference to the otherwise-provided clause in section 1441(a). It is unlikely that such was merely an oversight, particularly in light of the three clear and carefully explained changes made for the purpose of reducing removal. It is even less likely that the drafters of § 1441, disregarding the general practice of reducing removal, intended the otherwise-provided clause actually to increase removal. Had that indeed been the purpose of the clause, the Reviser's Notes would assuredly have called that alteration to the attention of Congress.

The circumstances which in 1938 had prompted Congress to bar removal of FLSA claims had not substantially changed in 1948, or even later. Many FLSA actions continue to be for "relatively modest-sized claims." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981)(Burger, C.J., dissenting). It remains the case that for such plaintiffs in particular removal "burdens . . . claimants . . . [forcing them] to

go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to [a] . . . worker's home." *Horton v. Liberty Mut. Ins. Co., 367* U.S. 348, 351 (1961). *See Lemay v. Budget Rent A Car Systems, Inc., 993* F.Supp. 1448, 1451 (M.D.Fla. 1997); *Wilkins v. Renault Southwest, Inc.,* 227 F.Supp. 647, 648 (N.D.Tex. 1964). Many of the supporters of the 1938 FLSA were still in Congress when the 1948 recodification was adopted. If section 1441(a) had been understood to overturn by implication the earlier congressional decision to bar removal of FLSA claims, assuredly such a proposed change would have occasioned comment and controversy.

C. The Existence of Removal-Precluding Statutes Which Do Use The Word "Remove" Does Not Render The Language of the FLSA Insufficient To Satisfy the Otherwise-Provided Clause

The First Circuit has suggested that the FLSA is insufficient to meet the requirements of the otherwise-provided clause because the FLSA, unlike several other removal-limiting statutes, does not actually use the term "removal:"

> If Congress wished to give plaintiffs an absolute choice of forum it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here.

Cosme Nieves v. Deshler, 786 F. 2d 445,451 (1st Cir. 1986)(footnote omitted). This argument might have some force if Congress had first enacted section 1441(a) (establishing the standard), then enacted statutes utilizing the term "removal" (showing itself capable of using that particular unmistakable term), and then finally enacted the FLSA (failing to follow the easily available model of the earlier statutes).

The actual order of enactment, however, was entirely different. Section 16(b) of the FLSA was enacted in 1938, a full decade before the language of section 1441(a)--whatever standard it may have embodied--was adopted. It would have been impossible--not easy--for the 75th Congress to have considered and met some standard that was not created until the 80th Congress enacted section 1441(a) ten years later.

Of the statutes relied on by the First Circuit, and by the Eleventh Circuit below, several were also enacted prior to 1948. *E.g.* 15 U.S.C. § 77v(a)(1933)[35], 28 U.S.C. §§ 1445(a)(1911)[36], 1445(b)(1914)[37]. But these pre-1948 laws could not be said to show that Congress (in 1911, 1914 and 1933, respectively) somehow foresaw how to meet a standard which would only come into existence years later.

Other statutes relied on by the First and Fourth Circuits were adopted after 1948. *E.g.*, 15 U.S.C. §§ 1719 (1968), 3612 (1980)[38]; 28 U.S.C. §§ 1445(c) (1958), 1445(d) (1994). Even if these post-1948 laws could be said to show that Congress after 1948 deliberately opted to utilize particular language to satisfy the otherwise-provided clause, that was not a practice which could have been known to (and thus tellingly have been

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35 48 Stat. 86, 87. A specific reference to removal was needed because section 77v(a) provided for concurrent federal and state court jurisdiction.

36 36 Stat. 1095.

37 38 Stat. 278 c. 11.

38 An express reference to removal was necessary because sections 1719 and 3612 provided for "concurrent" jurisdiction in federal and state courts.

disregarded by) Congress in 1938. The fact that Congress in the years after 1948 did not reach back and amend the FLSA proves nothing. The removability of FLSA claims turns on the original terms and meaning of that 1938 law and of the 1948 enactment of section 1441(a); if FLSA claims remained non-removable in 1949, subsequent congressional inaction (or the subsequent enactment of other statutes) does not alter the removability of FLSA claims. Post-1948 inaction or legislation on other topics cannot change the meaning of the 1938 and 1948 legislation.

When Congress in 1958 enacted section 1445(c), barring removal of workers' compensation cases, it did so with the express intent of giving to workers in those cases the same right already enjoyed by employees in FLSA claims to sue and remain in state court:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workmen the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act.

S.Rep. No. 1830, 85th Cong., 2d Sess. (1958), 9[39]. It would be

---

[39] Workers' compensation cases had previously been removable on the basis of diversity.

quite perverse if the adoption of section 1445(c), enacted for the express purpose of assuring that workers' compensation and FLSA actions would be treated alike, could now be invoked to demonstrate that Congress in fact wanted to treat these two types of claims differently.

CONCLUSION

For the above reasons, the opinion of the court of appeals should be reversed, and the case remanded to the Circuit Court, in and for the Fourth Judicial Circuit, in and for Duval County, Florida.

Respectfully submitted,

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No. 02-337

IN THE

Supreme Court of the United States

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction" as used in 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA") constitutes an express act of Congress prohibiting removal of FLSA claims?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Jim's Concrete of Brevard, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are as follows:

28 U.S.C. § 1331, the federal question statute, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a) of the removal statute provides as follows:

> Except as otherwise expressly provided by act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Section 16(b) of the FLSA, as amended, 29 U.S.C. § 216(b), provides in part:

> Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any

employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

STATEMENT OF THE CASE

This case arises out of an order from the United States District Court for the Middle District of Florida denying Petitioner Phillip T. Breuer's ("Petitioner") motion for remand. On or about June 21, 2001, Petitioner filed suit against Jim's Concrete of Brevard, Inc. ("Respondent") in state court in Duval County, Florida seeking relief solely for alleged violations of the FLSA. Respondent timely removed the case to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §§ 1441(a) and 1446. Petitioner subsequently filed a motion for remand, arguing that FLSA lawsuits may not be removed to federal court. Petitioner filed a motion for certification pursuant to 28 U.S.C. § 1292(b) to take an interlocutory appeal contemporaneously with the motion for remand. On December 7, 2001, the district court sided with the majority of courts to address the issue in recent years, and entered an order holding that FLSA actions may be removed to federal court.

That same day, the district court entered a separate order granting Petitioner's motion for certification. Petitioner then filed a petition requesting that the Eleventh Circuit Court of Appeals permit him to take an immediate appeal of the district court's order denying his motion for remand. On or about January 15, 2002, the Eleventh Circuit entered an Order granting the petition. On June 5, 2002, after briefing and oral argument, the Eleventh Circuit, like the district court, sided with the majority rule holding that FLSA actions may be removed. As a result, the Eleventh Circuit issued an opinion affirming the district court's order denying Petitioner's motion for remand. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

Petitioner filed a timely petition for writ of certiorari, and this Court granted the petition on January 10, 2003.

SUMMARY OF THE ARGUMENT

The resolution of this case turns on the interpretation of statutory language contained in 28 U.S.C. § 1441(a) and 29 U.S.C. § 216(b), respectively. Specifically, the issue is whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction," as used in the FLSA, constitutes an express act of Congress prohibiting the removal of FLSA claims. Petitioner argues that this language creates an *absolute bar* to removal of FLSA claims brought in state court. But Congress' use of the phrase "may be maintained" simply does not rise to the level of an express prohibition against removal of FLSA claims; a fact recognized by a developing majority of courts. The Eleventh Circuit Court of Appeals was correct in joining these courts by deciding that FLSA claims are properly removable.

Furthermore, Petitioner's arguments do not require reversal of the decision below which, consistent with the majority of courts to address this issue, held that there is no express Act of Congress barring the removal of FLSA actions. Petitioner is asking this Court to view the language of the FLSA in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a). But even viewed in isolation, the FLSA contains no express ban on removal as Petitioner contends. Moreover, neither the legislative history to the 1948 amendments to section 1441(a), nor a stray remark in a Senate committee report to the 1958 amendments to 28 U.S.C. § 1445 provide support for Petitioner's position. In addition, the rule requiring narrow construction of jurisdictional statutes has no application in a case that, like this one, was properly removed, arises under a federal statute, and poses no risk of interfering with state courts' ability to construe state law.

Finally, aside from the express statutory language of section 1441(a), there are sound policy reasons justifying the Eleventh Circuit's conclusion that Congress has not prohibited removal of FLSA claims. First, there are other federal statutes that contain language similar to that found in the FLSA. An order reversing the decision below could eliminate a defendant's right to remove cases arising under a number of other federal statutes. Consequently, employers would be permitted to remove cases arising under some federal employment statutes, but be prohibited from doing so in cases arising under others. This would create an anomaly in the body of federal employment law. Second, contrary to Petitioner's assertions, cases arising under the FLSA oftentimes have huge ramifications for employers. FLSA actions can involve large verdicts or settlements, particularly when they are asserted as collective actions. Third, federal judges have developed an expertise borne by familiarity in

addressing FLSA cases that is not shared by their state court counterparts. Lastly, an order reversing the decision below could leave employers in the untenable position of defending a case brought by one employee in state court and another employee in federal court, both involving identical issues, without any means of consolidating the two cases.

ARGUMENT

I. By Its Plain Language, 28 U.S.C. § 1441(a) Provides That An Express Act Of Congress Is Necessary To Prohibit Removal Of An Action Arising Under A Federal Statute. Congress Has Not Expressly Prohibited Removal of FLSA Actions.

The lone issue before the Court is whether Congress has included an express prohibition against removal in the FLSA. In the case at bar, Petitioner seeks relief under a federal statute, and there are no pendant state law claims. As a result, the district court below indisputably had original jurisdiction over Petitioner's claims. 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Thus, the question becomes whether Congress has "expressly provided" that removal of FLSA claims is prohibited. The analysis of this issue starts, as it always does in a case of statutory interpretation, with the plain language of the relevant statutes. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808, (1997). Here, there are two relevant statutes.

The first is 28 U.S.C. § 1441, captioned "Actions removable generally." This is often referred to as the general removal statute, and it establishes an unambiguous and quite rigid standard for determining whether a claim arising under a federal statute can be removed. Under the statute, civil actions brought in state court over which the federal courts have original jurisdiction may be removed to federal court "***[e]xcept as otherwise expressly provided by Act of Congress***." 28 U.S.C. § 1441(a) (emphasis supplied). This statute makes it unequivocally clear that absent an express declaration by Congress to the contrary, civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982); *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986) ("Congress has made plain that the right of removal is to stand absent an express provision to the contrary. . . ."), *cert. denied*, 479 U.S. 824 (1986).

In this regard, Congress has shown itself adept at drafting language that satisfies the "express prohibition" standard created by 28 U.S.C. § 1441(a). In a number of statutes, Congress has explicitly prohibited or limited the right to remove claims to federal court. For example, 28 U.S.C. § 1445 is captioned, "Nonremovable actions," and expressly limits or prohibits the removal of several different kinds of cases.[1]

Section 1445(a) expressly prohibits removal of actions brought against a railroad or its trustees in state courts for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"). 28 U.S.C. § 1445(a) ("[a]

1. The pertinent language of each of the statutes quoted in this section is included in Appendix "A."

civil action in any State court against a railroad . . . may not be removed to any district court of the United States."). As a result, removal of FELA actions has been prohibited without regard to the jurisdictional grounds alleged by the party seeking removal. *See, e.g., Great Northern Railway Co. v. Alexander*, 246 U.S. 276, 38 S. Ct. 237, 62 L. Ed. 713 (1918); *Loftus v. Delaware & H.R. Corp.*, 122 F. Supp. 829, 830 (M.D. Penn. 1954) (Section 1445(a) prohibits removal even though there is diversity of citizenship or the action involves a federal question); *Brown v. National Railroad Passenger Corp.*, 725 F. Supp. 873 (D. Md. 1989) (same).

Section 1445(b) limits the removal of suits brought against a common carrier, its receivers or trustees in a state court under the Interstate Commerce Act for damages unless the amount in controversy exceeds $10,000. 28 U.S.C. § 1445(b) ("[a] civil action in any State court against a carrier . . . to recover damages . . . arising under section 11706 or 14706 of title 49 may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs."). And, in 1958, Congress made suits arising under the worker's compensation laws of the state in which the federal district court is sitting nonremovable. 28 U.S.C. § 1445(c) ("[a] civil action in any State court arising under the workmen's compensation laws of such state may not be removed to any district court of the United States."). Lastly, in section 1445(d), Congress expressly prohibited the removal of claims arising under 42 U.S.C. § 13981, the Violence Against Women Act of 1994 ("VAWA"). 28 U.S.C. § 1445(d) ("[a] civil action in any State court arising under section 40302 of the [VAWA] may not be removed to any district court of the United States.").[2]

2. This Court recently ruled that Congress lacked constitutional authority to create the VAWA's civil remedy. *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000).

Express limitations on the right of removal can be found in places other than 28 U.S.C. § 1445. By way of example, the Securities Act of 1934 creates a cause of action for misrepresentations made in connection with the sale of a security. 15 U.S.C. § 77*l*(a). As is true with the FLSA, state and federal courts have concurrent jurisdiction to enforce claims arising under the Securities Act. 15 U.S.C. § 77v. But unlike the FLSA, the Securities Act contains language expressly prohibiting the right of removal except under certain limited circumstances. 15 U.S.C. § 77v(a) ("[e]xcept as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States.").

The same can be said for the Interstate Land Sales Full Disclosure Act, enacted in 1968. 15 U.S.C. § 1701, *et seq.* ("ILSA"). Congress designed ILSA to promote full and fair disclosures by sellers of real property. James L. Oliver, *Beyond Consumer Protection: The Application of the Interstate Land Sales Full Disclosure Act to Condominium Sales*, 37 U. Fla. L. Rev. 945, 950 (Fall, 1985). The ILSA imposes certain duties on developers who make use of the mails and interstate commerce, and creates claims against those who breach those duties. 15 U.S.C. § 1709(a); 15 U.S.C. § 1703. Claims under the ILSA may be brought in either state or federal court, and Congress has expressly prohibited removal such claims unless the United States or an officer or employee of the United States in his official capacity is a party. 15 U.S.C. § 1719 ("[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed . . . except where the United States or any officer or employee of the United States in his official capacity is a party."). Similarly, the Condominium

and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C. § 3601, *et seq.*, enacted in 1980, contains an identical express limitation on removal. 15 U.S.C. § 3612 ("[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed . . . except where the United States or any officer or employee of the United States in his official capacity is a party.").

In stark contrast to the statutes cited above, there simply is no ***express*** prohibition against removal in the FLSA, the second of the two statues relevant to this case. The term "express" has been defined to exclude ambiguity. Black's Law Dictionary defines express as "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* p. 601 (7th ed. 1999); *see also Ballantine's Law Dictionary* p. 441 (3d ed. 1969) ("[s]tated, explicit, clear; declared; not left to implication); *Merriam-Webster's Collegiate Dictionary* p. 410 (10th ed. 1993) ("directly, firmly, and explicitly stated"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* p. 448 (Encyclopedic Ed. 1978) ("[s]et forth distinctly; explicit; plain; direct"); *Webster's New World Dictionary* 494-95 (2d college ed. 1982) ("specific").

There is no express prohibition against removal in the statute itself; indeed, the FLSA does not even mention the term removal. Instead, the statute provides that an action brought under the FLSA "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). Petitioner seizes on the word "maintained," and argues that by employing this language, Congress has created an *absolute bar* to removing FLSA claims. But the statute contains no express prohibition against removal, and the only two circuit courts to address the issue in the last fifty years

have permitted FLSA claims to be removed. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d at 1310; *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986). Indeed, "the overwhelming majority of jurisdictions considering the issue in recent years have . . . permitted defendants to remove FLSA cases commenced in state court." *Bingham v. Newport News Shipbuilding and Drydock Co.*, 3 F. Supp. 2d 691, 692 (E.D. Va. 1998). *See also*, *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001) (use of term "maintained" is not express directive of non-removability); *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001) (words "may be maintained" are not an express exemption from the general scope of the removal statute); *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347 (M.D. Ala. 2000) (there is no "Act of Congress" barring removal of FLSA claim); *Shaw v. CF Data Corp.*, 2001 WL 1326528 (N.D. Tex. Oct. 15, 2001) ("majority of courts to consider question have permitted removal" . . . "[t]his court will follow majority and permit removal."); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F. Supp. 2d 583, 585 (use of phrase "may be maintained" does not constitute an express statement of nonremovability, and is at best, ambiguous); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989, 991 (E. D. Mo. 1991) (denying motion to remand on grounds that Congress had not expressly provided that FLSA actions could not be removed from state to federal courts); *Ramos v. H. E. Butt Grocery Co.*, 632 F. Supp. 342, 343 (E. D. Pa. 1986) (denying motion to remand on grounds that unlike other federal statutes, FLSA did not include express prohibition on removal); *Taylor v. Brown*, 461 F. Supp. 559, 560 (E. D. Tenn. 1978) (holding that FLSA action could be removed to federal court).

These courts have correctly recognized that the FLSA does not expressly prohibit removal. Rather, it simply creates concurrent jurisdiction in state and federal courts and, by itself, the grant of concurrent jurisdiction is insufficient to bar removal. *See, e.g., Dorsey v. City of Detroit*, 858 F.2d 338, 341 (6th Cir. 1988) (weight of judicial authority supports conclusion that grant of concurrent jurisdiction does not imply removal is prohibited); *see also Williams v. Ragone*, 147 F.3d 700, 703 (8th Cir. 1998); *Johnson v. First Unum Life Ins. Co.*, 914 F. Supp. 51, 52 (S.D.N.Y. 1996); 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729, at 495 (2d ed.1985) ("A congressional grant of concurrent jurisdiction in a statute does not imply that removal is prohibited.").

In short, this case was properly resolved by the court below in accordance with a growing trend through simple statutory interpretation. This Court recently made it abundantly clear that it takes seriously the unambiguous language of 28 U.S.C. § 1441(a). *Sygenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 374, 154 L. Ed. 2d 368 (2002). Section 1441(a) provides that "[e]xcept as otherwise expressly provided by act of Congress" civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. 28 U.S.C. § 1441(a). In this case, district courts undeniably have original jurisdiction over FLSA claims, and there is no express act of Congress prohibiting such claims from being removed.

II. Petitioner's Arguments Fail To Require Reversal Of The Decision Below Which, Consistent With The Majority Of Courts To Address This Issue, Held That There Is No Express Act Of Congress Barring The Removal Of FLSA Actions.

Furthermore, Petitioner's arguments do not require reversal of the decision below which, consistent with majority of courts to address this issue, held that there is no express Act of Congress barring the removal of FLSA actions. Petitioner is asking this Court to view the language of the FLSA in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a). But even viewed in isolation, the FLSA contains no express ban on removal as Petitioner contends. Moreover, neither the legislative history to the 1948 amendments to section 1441(a), nor a stray remark in a Senate committee report to the 1958 amendments to 28 U.S.C. § 1445 provide support for Petitioner's position. Lastly, the rule requiring narrow construction of jurisdictional statutes has no application in a case that, like this one, was properly removed, arises under a federal statute, and poses no risk of interfering with state courts' ability to construe state law.

A. Petitioner Ignores The Plain Language Of 28 U.S.C. § 1441(a).

Petitioner lists three questions presented for review, but none of them mentions the express language of section 1441(a). This is astounding given that Respondent invoked section 1441(a) in removing this case, and it reveals a fundamental flaw in Petitioner's analysis. Specifically, Petitioner is asking the Court to ignore the express language in section 1441(a), and hold that the phrase "may be maintained" creates an absolute bar on removal. As support,

he relies on a fifty-five year-old decision from the Eighth Circuit Court of Appeals, *Johnson v. Butler Bros.*, 162 F. 2d 87, 89 (8th Cir. 1947), that was decided a full year before section 1441(a) took its present form. Petitioner argues that the *Johnson* case creates a split in the circuit courts on the removability of FLSA claims, and even goes so far as to reference the brief filed by the Department of Labor in the case as support for his argument.

Petitioner's reliance on *Johnson* and its progeny is tenuous at best. Even the *Johnson* court recognized that the FLSA does not contain a clear Congressional directive barring removal:

> This question as to the intent of Congress has given the federal courts much difficulty. . . . For this unfortunate situation the courts are not to blame. It is attributable to the *failure of congress to clearly and accurately express its intent*. . . . There can be no just criticism of those courts which have concluded that the language used by Congress was inadequate to disclose a clear intent that actions brought in state court under the [FLSA] should not be removable.

Id. at 89 (emphasis supplied). Not only did the *Johnson* court fail to find any express language banning removal, it agonized over the meaning and intent of the word "maintained," and went so far as to criticize Congress for failing to be more clear in expressing its intent.

It is also important to emphasize that *Johnson* was decided in 1947, one year before Congress amended 28 U.S.C. § 1441(a) to require that any prohibition against

removal be by an express Act of Congress. Therefore, the *Johnson* court never addressed the statutory language at issue here. And, although *Johnson* has never been overruled, its continuing viability has repeatedly been called into question, even within the Eighth Circuit. As one district court within the Eighth Circuit recently put it, "since the decision in *Johnson*, the majority of district courts, and the only circuit courts which have addressed the issue, have concluded that *Johnson* is no longer good authority in light of the 1948 amendment to § 1441(a)." *Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 439 (N.D. Iowa 1997).

By its plain language, 28 U.S.C. § 1441(a) now provides that nothing short of an express statutory provision precludes removal. Since the amendment, only two circuits have addressed this issue. *Cosme Nieves*, 786 F.2d at 451; *Breuer*, 292 F.2d at 1309-10.[3] Not surprisingly, both courts held that the "may be maintained" language in the FLSA does not constitute an express provision barring the right of removal.

Moreover, even if one ignores the command of section 1441(a), the FLSA contains no absolute ban on removal as Petitioner contends. Petitioner cites this Court's decision in *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377, 53 S. Ct. 620, 77 L. Ed. 1265 (1933), for the proposition that

3. The Fifth Circuit suggested in *dicta* that FLSA actions are subject to removal in *Baldwin v. Sears Roebuck & Co.*, 667 F.2d 458, 460-61 (5th Cir. 1982) (holding that Age Discrimination in Employment Act Claims, 29 U.S.C. § 621, *et seq.* are removable). In *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1996 (9th Cir. 1988), the Ninth Circuit cited the FLSA as an example of a federal statute which contain[s] no limitation on removal, express or otherwise, to bar removal as required under § 1441(a). This language was not, however, central to the holding in the case.

Congress' use of the word "maintain" in the FLSA creates an absolute bar on removal. The *George Moore* case however, has nothing to do with removal, and there the Court dealt with the word "maintain" in an entirely different context. In particular, the Court held that a statute authorizing a taxpayer to "maintain" a suit to recover tax, irrespective of protest, removed the requirement of protests in tax recovery actions brought after the enactment of the statute. *Id.* In *George Moore*, the Court merely found that maintain "means *no less* than to prosecute with effect." *Id.* (emphasis supplied). Significantly, the *George Moore* Court neither held nor implied that the word "maintain" cannot have meanings other than the one set out in the opinion, and the case does not even address the subject of removal, much less create an absolute bar to removal. *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

To be sure, "maintain" has meanings other than the one identified by the *George Moore* Court. In fact, Black's Law Dictionary contains six different definitions of the word. Among those definitions are "to continue (something)" and "to assert (a position or opinion)." *Black's Law Dictionary* p.601 (7th ed. 1999). Ballentine's Law Dictionary defines "maintain" to mean "[t]o support; to keep in condition; to sustain," but defines a "maintainable action" as "an action capable of being maintained; capable of being sustained or entertained by a court." *Ballantine's Law Dictionary* p. 764 (3d ed. 1969); *see also Merriam-Webster's Collegiate Dictionary* p.702 (10th ed. 1993) (defining "maintain" to mean both "to continue or persevere in" and "to affirm in or as if in argument: assert"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* p. 768 (Encyclopedic Ed. 1978) (defining "maintain" to mean "to carry on or continue" and "to assert or

state; affirm"); *Webster's New World Dictionary* 854 (2d college ed. 1982)(defining maintain to mean both "to keep or keep up; continue in or with; carry on" and "to uphold or defend as by argument; affirm").

Clearly, the word "maintain" has various meanings, not just the one asserted by the Petitioner in this case. Given that the word is reasonably susceptible to more than one competing meaning, Congress' use of the term simply cannot be considered an absolute bar on removal as asserted by Petitioner. *See, e.g., Valdivieso*, 128 F. Supp. 2d at 1373 ("I simply do not believe that Congress is unable to be more express than the word maintained . . .").

Moreover, Petitioner fails to acknowledge that the word "may" appears before the word "maintained" in the statute. The word "may" is conditional, and suggests that something may or may not occur. It in no way expresses an absolute ban on removal. If anything, the use of the word "may" signals that the right to maintain a FLSA action in state court is merely conditional, and therefore subject to contingencies such as removal.

Along those lines, Congress has taken at least three approaches in framing jurisdictional provisions like the one contained in the FLSA. It has permitted plaintiffs to sue in federal court only. *See, e.g.*, 15 U.S.C. § 15 (cases arising under the antitrust laws). As is true with the FLSA, Congress has given plaintiffs a choice of state or federal court, subject to the defendant's right of removal. 29 U.S.C. § 216(b); *see also* 7 U.S.C. § 1365 (suits arising under the Agricultural Adjustment Act). Finally, it has given plaintiffs a choice of state or federal court not subject to removal. *See, e.g.*, 28 U.S.C. § 77v (cases arising under the securities laws). In this case, Petitioner is

essentially arguing that when Congress took the second approach, it actually intended to take the third, but failed to express itself clearly. But the second and third approaches described above "express different intentions with equal accuracy," and Petitioner has not presented anything to suggest that "Congress mistook its own purpose when choosing one approach" over the other. *See, e.g., Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 651 (S.D.N.Y. 1978).

B. The Legislative History Makes No Reference To Removal Of Claims Arising Under The FLSA, Much Less An Absolute Bar On Removal.

Nothing in the legislative history of the FLSA or 28 U.S.C. § 1441(a) indicates that Congress intended a bar on removal of FLSA claims. The legislative history of the FLSA instead indicates that Congress was concerned with the issue of whether employees, the government or both would have the right to bring suit, and whether there would be concurrent jurisdiction in state and federal courts. There was no debate or even any reference to the instant removal issue. *Swettman v. Remington Rand, Inc.*, 65 F. Supp. 940, 943 (S.D. Ill. 1946); H.R. Rep. No. 75-2738 (1938).

Similarly, the Reviser's Notes to the 1948 amendments to 28 U.S.C. § 1441(a) ("1948 Amendments") make no reference to the FLSA, much less indicate that Congress intended an absolute bar on removal of such actions. Nevertheless, Petitioner devotes a great deal of space in his brief arguing that the Reviser's Notes reveal that the amendments were not intended to "repeal the bar to removal" of FLSA claims. *See* Pet. Brief, pp. 28-40. The problem with Petitioner's argument is that it starts with a faulty premise;

that there was some sort of bar on removal of FLSA claims prior to 1948. A review of the reported decisions reveals that before 1948, the district courts of this country were divided about the removability of claims arising under the FLSA, as they are now. While Petitioner correctly points out that some district courts held that FLSA claims could not be removed, other courts reached the opposite conclusion. *See, e.g., Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D. N.J. 1940) (if Congress had intended to prevent removal of FLSA claims it would have used language more pertinent to that end) (*dicta*); *Owens v. Greenville News-Piedmont*, 43 F. Supp. 785, 789 (W.D.S.C. 1942) (denying motion to remand and stating it appears that when Congress intends to withdraw the privilege of removal, it does so in clear and unambiguous language; there is no such provision in the FLSA); *McGarrigle v. 11 West Forty-Second Street Corp.*, 48 F. Supp. 710, 711 (S.D.N.Y. 1942) (denying motion to remand FLSA claim); *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482, 484 (E.D. Ky. 1943) (denying motion to remand and holding that may be maintained language intended merely to dissipate any doubts as to state court's ability to hear FLSA claim); *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29, 32 (D. Minn. 1944) (denying motion to remand and noting that language of FLSA cannot "be held to limit or amend the provisions of the Removal Act."); *Ellems v. Helmers*, 65 F. Supp. 566, 567 (E.D.N.Y. 1944) (denying motion to remand FLSA claim); *Swettman v. Remington Rand, Inc.*, 65 F. Supp. at 943 (denying motion to remand, holding that word "maintained" has no technical meaning, and is an insufficient basis upon which to deny a defendant the important right to removal). Consequently, there is little support for the assertion that there was an absolute ban on removal of FLSA claims before 1948.

Furthermore, the Reviser's Notes to the 1948 amendment to 28 U.S.C. § 1441(a) mention neither the FLSA nor the "otherwise expressly provided" language adopted in connection with the amendment. As a result, there is no way to determine the intended effect of the 1948 Amendments on the FLSA, or indeed, whether Congress ever considered the matter at all. Thus, one must rely on the explicit language of section 1441(a) in evaluating whether claims arising under the FLSA are removable, and based upon that language, such claims clearly are. *Robinson*, 519 U.S. at 340 (where the statute has a plain and unambiguous meaning, we look no further).

Petitioner also relies on a stray remark included in a Senate committee report to the 1958 amendment to section 1445(c), making worker's compensation cases non-removable. S. Rep. No. 85-1830, at 8 (1958). This report is often relied upon by those who oppose permitting removal of an FLSA action, who argue that the report somehow manifests congressional intent to bar removal of FLSA actions. *Cosme Nieves*, 786 F.2d at 451 n.18. The committee report states in pertinent part:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the states. In the Jones Act, the Fair Labor Standards Act, and the Railway Employer's Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workmen the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This

> proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act.

S. Rep. No. 85-1830, at 8 (1958).

The *Cosme Nieves* court flatly rejected this argument, observing that the committee report in question involved 28 U.S.C. § 1445, making state worker's compensation claims nonremovable, and neither 28 U.S.C. § 1441(a) nor 29 U.S.C. § 216(b) were cited in relation to the statement. *Cosme Nieves*, 768 F.2d at 951, n.18. A stray remark in a committee report simply does not satisfy the rigid standard created by 28 U.S.C. § 1441(a); it does not rise to the level of an express provision by Act of Congress. *Id. See also Roseman*, 140 F. Supp. 2d at 1337 ("the fact that parties are relegated to finding obscure legislative history in support of their assertion that Congress has expressly provided that FLSA claims are not removable merely underscores the reality that the statute is not express on its face."). As a result, the Senate committee report does not provide a basis for reversing the decision below.

C. The Rule Requiring Narrow Construction Of Jurisdictional Statutes Does Not Apply Where, As Here, A Case Arising Under A Federal Statute Was Properly Removed, And There Is No Risk Of Interfering With State Courts' Ability To Construe State Law.

Petitioner relies extensively on the rule requiring narrow construction of jurisdictional statutes to support his arguments for reversal of the decision below. *See, e.g., Healy*

v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 (1934); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). The "narrow construction" rule seems to arise most frequently in the context of challenges to the federal court's exercise of original jurisdiction based upon diversity of citizenship. This is not surprising given that the rule is intended to protect the "power reserved to the states, under the Constitution, to provide for determination of controversies in their courts." *Shamrock*, 313 U.S. at 107-108. In other words, the narrow construction rule was primarily designed to ensure that the federal government does not usurp the power of state courts to hear controversies arising under state law.

The present case, of course, does not involve a controversy arising under state law, and Petitioner does not cite a single narrow construction rule case with facts similar to this one. Specifically, none of the narrow construction cases cited by Petitioner involve defendants who have taken appropriate steps to remove cases arising under a federal statute. For the most part, the authorities cited by Petitioner involve: (1) cases lacking the requisite amount in controversy or complete diversity of citizenship; (2) cases addressing the "well-pleaded complaint" rule; (3) cases in which the defendant either failed to comply with the requirements of the removal statute; or (4) cases where the narrow construction rule was discussed, but removal was ultimately deemed proper.

For example, Petitioner relies on one of the seminal cases addressing the narrow construction rule, *Healy*. There, the plaintiff brought suit against the chief of police for the City of Manchester, New Hampshire to enjoin him from enforcing

the state's "Hawkers and Peddler's Act," Ch. 102, New Hampshire Laws of 1931.[4] *Healy*, 292 U.S. at 264. The issue before the Court was whether the amount in controversy was sufficient to permit the federal district court to exercise jurisdiction, and not whether Congress expressly prohibited removal of a claim arising under federal law. *Id.* at 267; *see also University of South Alabama v. American Tobacco Co.*, 168 F.3d 405 (11th Cir. 1999) (referencing narrow construction rule and holding district court lacked subject matter jurisdiction because of absence of complete diversity of citizenship).

Likewise, some of Petitioner's narrow construction cases involve the "well-pleaded complaint" rule. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002). The well-pleaded complaint rule is used to determine whether federal question jurisdiction exists. *Holmes Group, Inc.*, 122 S. Ct. at 1893; *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Under the rule, federal jurisdiction exists when a federal question appears within the four corners of a plaintiff's well pleaded complaint. *Id.* In this case, of course, a federal question does indeed appear within the four corners of Petitioner's complaint.

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4. The statute imposed a state-wide license tax on salesmen. *Healy v. Ratta*, 202 U.S. at 264. Notably, a federal court faced with a similar suit today would almost certainly decline to accept jurisdiction. *See* 28 U.S.C. § 1341 ("district courts shall not enjoin . . . the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.").

Similarly, some of Petitioner's narrow construction cases are distinguishable in that the cases involve some defect in the removal process itself. For example, in a case involving multiple defendants, 28 U.S.C. § 1446 requires that all defendants either join or consent to the removal notice. 28 U.S.C. § 1446. Where fewer than all the defendants have joined in a removal action, the removing party has the burden of explaining the absence of any co-defendants in the notice of removal. *See, e.g., Northern Illinois Gas Co. v. Airco Ind. Gases*, 676 F. 2d 270, 273 (7th Cir. 1982); 16 James Wm. Moore, et al., *Moore's Federal Practice* § 107.11(d) (Matthew Bender 3d ed. 1997). These requirements were never satisfied, however, in *Prize Frize, Inc. v. Matrix, Inc.*, 167 F. 3d 1261 (9th Cir. 1999), one of the cases relied upon by the Petitioner. As a result, the court held that removal was improper. *Id.* at 1266-67. In the case at bar, Petitioner has never asserted that Respondent's removal was defective on procedural grounds.

Lastly, a number of Petitioner's narrow construction rule cases cite the rule in passing, but then go on to hold that removal was proper. *Manguno v. Prudential Property & Cas. Ins.*, 276 F. 3d 720 (5th Cir. 2002) (diversity case affirming order denying motion for remand); *Whitaker v. American Telecasting, Inc.*, 261 F. 3d 196 (2d Cir. 2001) (same); *Danca v. Private Healthcare Sys., Inc.*, 185 F. 3d 1 (1st Cir. 1999) (ERISA case affirming order denying motion for remand).

In short, the narrow construction rule is intended primarily to ensure that federal courts do not interfere with the state courts' ability to construe state law. While the rule serves a salutary purpose, it simply has no application in a case that, like this one, arises under a federal statute. In the case of a claim arising under federal law, 28 U.S.C. § 1441(a)

mandates that such a claim may be removed, "except as otherwise expressly provided by Act of Congress." This standard contains no reference to the rule of narrow construction, and the rule has no application here.

III. There Are Sound Policy Reasons Justifying The Eleventh Circuit's Conclusion That Congress Has Not Expressly Prohibited Removal Of FLSA Actions.

Finally, aside from the express statutory language of section 1441(a), there are sound policy reasons justifying the Eleventh Circuit's conclusion that Congress has not prohibited removal of FLSA claims. First, there are other federal statutes that contain language similar to that found in the FLSA. An order reversing the decision below could affect a defendant's right to remove cases arising under a number of other federal statutes. Consequently, employers would be permitted to remove cases arising under some federal employment statutes, but prohibited from doing so in cases arising under others. This would create an anomaly in the body of federal employment law. Second, contrary to Petitioner's assertions, cases arising under the FLSA oftentimes have huge ramifications for employers. FLSA actions can involve large verdicts or settlements, particularly when they are asserted as collective actions. Third, federal judges have developed an expertise borne by familiarity in addressing FLSA cases that is not shared by their state court counterparts. Lastly, an order reversing the decision below could leave employers in the untenable position of defending a case brought by one employee in state court and another employee in federal court, both involving identical issues, without any means of consolidating the two cases.

A. This Case May Also Decide Whether Congress Has Expressly Prohibited Removal Of Claims Arising Under The Equal Pay Act, Family Medical Leave Act, Employee Polygraph Protection Act, and Age Discrimination In Employment Act.

Petitioner asserts that Congress' use of the phrase "may be maintained" in the FLSA creates an absolute bar to removal of claims arising under the statute. If the Court adopts Petitioner's position, it will create inconsistency in federal employment law. Specifically, defendants would be permitted to remove cases arising under some federal employment laws, but arguably would be prohibited from doing so under a number of others.

As an initial matter, the decision in this case will necessarily impact claims arising under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"), a portion of FLSA. In general terms, the EPA prohibits employers from establishing sex-based discriminatory rates of pay. 29 U.S.C. § 206(d). Since the EPA is part of the FLSA, the decision in this case will also determine removability of EPA claims. 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

Further, Congress has enacted a number of federal laws containing language substantially similar to that used in section 216(b) of the FLSA. By way of illustration, section 2617 of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA"), provides, in pertinent part:

> An action to recover the damages or equitable relief prescribed in paragraph (1) ***may be maintained against any employer (including a***

> ***public agency) in any Federal or State court of competent jurisdiction*** by any one or more employees for and in behalf of (A) the employees; or (B) the employees and other employees similarly situated.

29 U.S.C.A § 2617(a)(2) (emphasis supplied). Likewise, section 2005 of the Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq.* ("EPPA"), provides:

> An action to recover the liability prescribed in paragraph (1) ***may be maintained against the employer in any Federal or State court of competent jurisdiction*** by any employee or prospective employee for or on behalf of such employee, prospective employee, and other employees or prospective employees similarly situated. No such action may be commenced more than three years after the date of the alleged violation.

29 U.S.C. § 2005(c)(2) (emphasis supplied). Based on the similarities in the statutory language, adopting Petitioner's position would not just affect claims arising under the FLSA, it would arguably prevent the removal of claims arising under the FMLA and the EPPA as well.[5]

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5. As is true with the FLSA, federal courts are split with respect to the meaning of the phrase "may be maintained" as it is used in the FMLA. *See, e.g., Ayotte v. Home Depot U.S.A., Inc.*, 2002 WL 524269 (N.D. Tex. 2002) (permitting removal of FMLA claim); *Lloyd v. Classic Chevrolet, Inc.*, 2002 WL 989470 (N.D. Tex. 2002) (relying on *Johnson*, and holding FMLA claims may not be removed). Respondent has not located a case addressing this issue in a claim arising under the EPPA.

Adopting Petitioner's position could also effectively prevent the removal of claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). The relevant language in the ADEA is a bit different than that of the FLSA, FMLA and the EPPA. In particular, the ADEA provides, in pertinent part:

> Any person aggrieved *may bring a civil action in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this chapter.

29 U.S.C. § 626(c)(1). The ADEA also expressly adopts several provisions of the FLSA:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title.

29 U.S.C. § 626(b). And, at least one court has held that the language of section 626(b) requires courts to look to section 216 of the FLSA in evaluating the removability of an FLSA claim. *Lemay v. Budget Rent A Car Systems, Inc.*, 993 F. Supp. 2d 1448, 1449 (M.D. Fla. 1997).[6]

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6. Petitioner spends several pages in his brief arguing that if Congress had used the word "bring" in the FLSA, as opposed to the word "maintain," FLSA claims would be removable. Pet. Brief at pp. 17-19. Apparently, this linguistic distinction is lost on some courts, including one in the district in which this case began. *Lemay v. Budget Rent A Car Systems, Inc.*, 993 F. Supp. at 1449.

If the Court holds that FLSA claims are not removable, the opinion could create uncertainty about the removability of claims arising under the EPA, FMLA, EPPA, and ADEA as well. However, these statutes are designed to protect important rights, and plaintiffs and defendants alike have an interest in the consistency provided by the federal court system. Perhaps more importantly, barring removal of claims arising under these statutes will create an anomaly in the law. It will mean that actions arising under some federal employment laws would be removable, while actions arising under other very similar federal employment laws would not be removable.

For example, defendants could remove cases for pay discrimination arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, but would be prohibited from removing a claim alleging identical facts arising under the Equal Pay Act, 29 U.S.C. § 206(d). Claims alleging disability discrimination arising under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, or cases for race discrimination arising under Title VII could be removed, but claims for age discrimination arising under the ADEA could not. Defendants could remove cases arising under ERISA, 29 U.S.C. § 1001, *et seq.*, for denial of an ERISA benefit, but could not remove cases under the FMLA for denial of FMLA leave. Such a system is simply illogical, and there is nothing in the express language of these statutes or their legislative history to indicate that Congress ever intended such an anomaly.

The court below thought it important for this Court "to resolve this issue and bring uniformity to the federal courts" with respect to removal of FLSA claims so that litigants are "not treated with such disparity in our federal

system." *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F. 2d at 1310. Reversing that court's decision, however, would have just the opposite effect.

B. Contrary To Petitioner's Assertion, Cases Arising Under The FLSA Can Have Enormous Ramifications For Employers.

Petitioner also asserts that claims arising under the FLSA often involve small sums of money, so defendants should not be permitted to remove them. Even if Petitioner were correct, this would be a policy consideration better left to the Congress. *Cosme Nieves*, 786 F. 2d at 451; *Valdivieso*, 128 F. Supp. 2d at 1374. Congress could, of course, remedy this situation fairly easily by imposing an amount in controversy minimum for removal of claims arising under the FLSA. Nonetheless, there is no such limitation in the statute.

Petitioner's argument also ignores the fact that FLSA cases can have enormous ramifications for employers, particularly when they are brought as collective actions. 29 U.S.C. § 216(b). The number of significant FLSA collective actions is on the rise. In 1999 alone, plaintiffs filed FLSA collective actions against SunRise Healthcare Corporation through a purported class of "thousands" of nurses;[7] against Longs Drug Stores, a chain with more than 300 stores in six states;[8] and, against a national auto parts company brought by a class of up to 20,000 female employees.[9] Not surprisingly, these cases can result in

7. *See* 103 Daily Lab. Rep. (BNA) A-9, 5/28/1999.

8. *See* 49 Daily Lab. Rep. (BNA) A-10, 3/15/1999.

9. *See* 02 Daily Lab. Rep. (BNA) A-4, 1/5/1999.

sizeable verdicts or settlements. Indeed, in 2001, there were more FLSA collective actions and class actions filed than class actions under the discrimination laws.[10] In just the last several months:

- Perdue Farms, Inc. agreed to pay $10 million to chicken and processing workers to resolve claims that it violated state and federal wage and hour laws by refusing to pay them for time spent putting on, taking off, and cleaning sanitary and protective equipment;[11] and

- Royal Caribbean Cruise lines announced that it was taking a $20 million charge in connection with settling an overtime lawsuit brought by past and current crew members.[12]

Petitioner's argument ignores another important point. FLSA defendants generally have no incentive to remove cases involving *de minimus* amounts because the FLSA provides that a plaintiff receive attorney's fees "in addition to any judgment awarded." 29 U.S.C. § 216(b). This language is both mandatory and one-sided. In other words, if the plaintiff prevails, the court must award attorney's fees, but if the defendant prevails, the court may not award attorney's fees.

10. *See* Eugene Scalia, Address at the 2002 Annual Meeting of the American Bar Association, Section of Labor and Employment Law, August 12, 2002, *reprinted at http://www.dol.gov/sol/media/speeches/abaspeech8-12-02.htm*; *see also* "Class actions for overtime on the rise" *Labor Law Reports Insight*, Issue 1299, No. 838, Part 2, December 26, 2002.

11. *See* 203 Daily Lab. Rep. (BNA) A-11, 10/21/02.

12. Gordon, Joanne, *C.H. Robinson Clocks More Lawsuit Miles*, http://www.forbes.com/2002/12/05/cz_jg_1205overtime.html.

See e.g., Kraeger v. Solomon & Flanagan, P.A., 775 F. 2d 1541, 1542 (11th Cir. 1985); *Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987) ("Section 216 provides for an award of attorney's fees, as opposed to granting the court discretion in awarding such fees, to the prevailing plaintiff in FLSA cases."). Because of the remedial purpose of the statute, courts do not "place undue emphasis on the amount of the plaintiff's recovery," and uphold "'substantial awards of attorney's fees even though a plaintiff recovered only a nominal amount.'" *Fegley v. Higgins*, 19 F. 3d 1126, 1135-35 (6th Cir. 1994) *quoting Posner v. The Showroom, Inc.*, 762 F.2d 1010, 1985 WL 13108 at *2 (6th Cir. 1985) (unpublished). Thus, even small judgments can result in large fee awards.

C. Federal Courts Have More Experience Than Their State Court Counterparts With The FLSA.

Federal judges are far more experienced in dealing with FLSA claims than are their state counterparts, and there is no evidence that Congress intended to deny defendants access to that expertise. *See, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990) (noting that federal judges have more experience with Title VII claims than do their state court counterparts, and characterizing this difference in experience as a factor that may motivate defendants to remove such cases to federal court). Indeed, the entire body of law on the FLSA is primarily federal. Research reveals that there are 1,819 reported state court decisions addressing the FLSA in one way or another.[13]

13. The research was performed on Westlaw on February 20, 2003. The search string, which was run in Westlaw's ALLSTATES database was as follows: FLSA or "Fair Labor Standards Act" or F.L.S.A.

By comparison, there are more than two times as many reported federal court decisions addressing the FLSA ***in the last ten years.***[14] The gap in experience is even more pronounced when claims arising under FMLA and ADEA are included in the calculation. Over the last ten years, there have been more than 16,000 reported federal decisions interpreting the FMLA, the ADEA or both.[15] State courts, on the other hand, have addressed these same statutes in only 1,913 reported cases.[16]

This disparity in experience would not be so much of an issue if the FLSA were a simple statute, but it is not. More than six hundred pages in the Code of Federal Regulations are devoted to both interpreting and expanding upon the provisions of the FLSA. *See* 29 C.F.R. Parts 500-899 (2001). Some of these regulations are enormously complex. For example, in this case, Respondent has alleged a defense based upon 29 C.F.R. § 778.114. This regulation permits an employer, under certain circumstances, to pay its employees a fixed salary for working fluctuating workweeks. It describes the circumstances upon which such a salary may be

14. Research on February 20, 2003 in Westlaw's ALLFEDS database using a date restriction designed to search for cases reported on or after January 1, 1993, and applying the same search string identified in the previous note produced 3,675 results.

15. This research was also performed on Westlaw on February 20, 2003. The search string included a date restriction designed to search for cases reported on or after January 1, 1993, and was as follows: FMLA or ADEA or A.D.E.A. or "Age Discrimination in Employment Act." The search produced 16,799 results.

16. This research was performed on Westlaw on February 20, 2003. The search string did not include a date restriction, and was as follows: FMLA or ADEA or A.D.E.A. or "Age Discrimination in Employment Act."

paid, and it sets out a formula for calculating overtime payments when the method is applicable. 29 U.S.C. § 778.114. The regulation is difficult to understand, and even more difficult to apply to a given set of facts. State courts have addressed this specific regulation in eleven reported cases.[17] There are, on the other hand, more than four times as many reported federal decisions that touch upon the regulation.[18]

Respondent does not mean to suggest that state court judges are incapable of interpreting the FLSA or the regulations promulgated pursuant to the statute. Instead, Respondent simply submits that given the language of the relevant statutes, defendants who wish to take advantage of the federal courts' experience in addressing the issues raised by the FLSA ought to be permitted to do so.[19]

17. This assertion is based on research performed on Westlaw on February 20, 2003. The search was performed in Westlaw's ALLSTATES database using the search string: 778.114 /s Fixed. It produced 11 results.

18. This assertion is based on research performed on Westlaw on February 20, 2003. The search was performed in Westlaw's ALLFEDS database using the search string: 778.114 /s Fixed. It produced 49 results.

19. Respondent does not have employees outside the state of Florida. Nevertheless, it seems apparent that state courts could have varying interpretations of individual regulations promulgated pursuant to the FLSA. This would, of course, make it extremely difficult for multi-state employers to comply with the statute.

D. Removal Eliminates The Risk Of Simultaneously Litigating The Same Issue In State and Federal Forums.

Lastly, an order reversing the decision below could place employers in the untenable position of litigating cases involving identical issues against two employees in two different courts. The problem can be illustrated with a hypothetical. Suppose that two employees of ABC Company file claims arising under the FLSA on the same day, one in state court and the other in federal court. If the state court case is removable, then the claims can be consolidated and the issues addressed by a single judge.[20] If the state law case cannot be removed, there is no mechanism for consolidating the two cases. ABC Company would be forced to defend the two cases in different forums. More importantly, ABC Company is at risk of receiving conflicting rulings placing it in the Catch-22 of choosing which of the two rulings to follow. Such an outcome is irrational, and there is nothing to indicate that Congress intended such a result.

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20. There are any number of ways that this can happen. For example, Rule 42, Federal Rules of Civil Procedure, permits consolidation where two cases within the same district involve common questions of law or fact. Fed. R. Civ. P. 42(a). And the same factors that support consolidation may be considered in ruling on a motion to transfer venue. *See, e.g., Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 24-25, 4 L. Ed. 2d 1540, 80 S. Ct. 1470 (1960); 28 U.S.C. § 1404(a). Moreover, actions arising under the FLSA and pending in different districts may be consolidated in accordance with 28 U.S.C. § 1407. *See In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation*, 196 F. Supp. 2d 1373, 1374-75 (J.P.M.L. 2002).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Eleventh Circuit Court of Appeals correctly affirmed the district court's order denying Petitioner's motion for remand. As a result, Respondent requests that this Court affirm the decision below.

Respectfully submitted,

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APPENDIX — STATUTES EXPRESSLY PROHIBITING REMOVAL

28 U.S.C. § 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under section 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

Appendix

The Securities Act of 1934 provides, in pertinent part:

15 U.S.C.A. § 77v Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Appendix

The Interstate Land Sales Full Disclosure Act provides, in pertinent part:

15 U.S.C.A. § 1719. Jurisdiction of offenses and suits

The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this chapter and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of Title 28. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this chapter brought by or against him in the Supreme Court or such other courts.

Appendix

The Condominium and Cooperative Conversion Protection and Abuse Relief Act provides, in pertinent part:

15 U.S.C.A. § 3612. Concurrent State and Federal jurisdiction; venue; removal of cases

> The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction under this chapter and, concurrent with State courts, of actions at law or in equity brought under this chapter without regard to the amount in controversy. Any such action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place and process in such cases may be served in other districts of which the defendant is an inhabitant or wherever the defendant may be found. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed too any court of the United States, except where any officer or employee of the United States in his official capacity is a party.

Supreme Court, U.S.
FILED
MAR 24 2003
CLERK

(8)

Case No. 02-337

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF ON THE MERITS FOR PETITIONER

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I. THE RULE THAT THE JURISDICTION OF FEDERAL COURTS SHOULD BE NARROWLY CONSTRUED APPLIES TO CASES INVOLVING FEDERAL QUESTION JURISDICTION

This case turns on the scope and vitality of the longstanding rule that the jurisdiction of the federal courts is to be narrowly construed. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941). That rule of construction plays a pivotal role in preserving the respective roles of the state and federal courts, and rests on principles that are implicit in the very structure of the Constitution and are expressly embodied in the Tenth Amendment. Any expansion of federal jurisdiction unavoidably carries with it a lessening of the authority of the states to determine cases that would otherwise be litigated in their own courts. *Healy v. Ratta*, 292 U.S. 263 (1934). Removal jurisdiction does so in a particularly intrusive manner, wrenching from the responsibility of a state court an action which was properly filed in and pending before that tribunal.

Respondent contends that *Shamrock Oil* and *Healy* are simply inapplicable when a litigant asserts that the federal courts have jurisdiction over a federal claim. The rule of construction in those decisions, Respondent insists, extends only to those cases in which a party is seeking to have a federal court adjudicate a claim arising under state law. (R.Br. 4, 12, 20-24). Respondent's contention is not (and logically could not be) limited to disputes about removal jurisdiction, but would apply with equal force to the original jurisdiction of the federal courts

Such a drastic limitation on *Shamrock Oil* and *Healy*, if adopted by this Court, would work a sea of change in the manner in which the lower courts have for decades resolved questions relating to removal jurisdiction. Since this Court's

seminal decision in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941), the lower courts have repeatedly relied on the principles of that case in limiting the scope of federal removal jurisdiction. Many of those decisions involved federal law claims, and would have to be reconsidered if Respondent's position were accepted[1].

Respondent's contention is clearly inconsistent with this Court's decision in *Healy v. Ratta*, 292 U.S. 263 (1934), which avowedly applied the rule of narrow construction to jurisdiction over a federal claim. The plaintiff in that case, alleging that New Hampshire officials had violated his rights under the Fourteenth Amendment, brought an action in federal district court. At that time, the federal question jurisdiction of the district courts was limited to cases in which the amount in controversy exceeded $3000. 292 U.S. at 266. Referring

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1

See, e.g., Oregon Bureau of Labor and Industries ex rel. Richardson v. U.S. West Communications, Inc., 288 F. 3d 414 (9th Cir. 2002)(federal claim under the Labor Management Relations Act' rule of construction utilized in determining what is a "state court" within the meaning of section 1441(a)); *Prize Frize, Inc. v. Matrix*, 167 F. 3d 1261 (9th Cir. 1999)(federal claim under RICO; rule of construction utilized in application of *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972)); *Dunn v. Gaiam, Inc.*, 166 F. Supp. 3d 1273 (C.D.Cal. 2001)(federal claim under RICO; rule of construction invoked in determining timeliness of removal); *Grubbs v. Pioneer Housing, Inc.*, 75 F. Supp. 2d 1323 (M.D.Ala.1999)(federal claim under the Magnuson-Moss Warranty Act; rule of construction utilized in determining whether jurisdictional amount required by that Act was present); *Webster v. Dow United Tech. Composite Products*, 925 F. Supp. 727 (M.D.Ala. 1996)(federal claim under ERISA; rule of construction invoked in determining timeliness of removal).

specifically to the provision (now 28 U.S.C. § 1331) creating federal question jurisdiction, the Court insisted that the Tenth Amendment as well as [t]he policy of the statute calls for its strict construction." 292 U.S. at 270.

The emasculated version of *Shamrock Oil* proposed by Respondent would have anomalous results. Respondent acknowledges that federal jurisdiction should be narrowly construed if it would give the federal courts jurisdiction over a state law claim, but stresses that no such state law claims were raised in the instant case. But, as we noted in our opening brief, many FLSA actions filed in state court do assert state law claims as well. (Pet. Br. 12 and n. 3). Many states have their own statutes creating rights analogous to the FLSA[2], and an FLSA claimant will often have a state law contract claim as well. At best the applicable rule of construction would vary according to whether such state law claims happened to be included in a complaint. Furthermore, in practice, Respondent's proposed limitation on *Shamrock Oil* would encourage FLSA claimants to increase the volume of litigation and add state law claims in order to decrease the likelihood of removal. Additionally, if a defendant asserted a state law counterclaim after removal had been approved, the propriety of removal would then have to be considered all over again.

2

See, e.g..., Alaska Stat. § 23.10.060; Ark. Code Ann. § 11-4-202; Cal. Lab. code § 1173, *et al.*; Ill. Code § 105/1 *et seq.*; La.R.S. 33:2213, *et al* (limited application).; 26 Maine R.S. § 664; Mass. Gen. Laws ch. 151 § 1A, *et al.*; Mich. Comp. Laws § 408e, 384(a)(4); Minn. Stat. § 177.21, *et seq.*; Mont. Code Anno. § 39-3-404 & 405; N.M.Stat. Ann. § 50-4-19, *et seq.*; Ohio Rev. Code Ann. § 4111.01 *et seq.*; 43 Pa. Stat. § 333.101, et seq.; Wash. Rev. Code § 49.46, *et seq.*; W.Va. Code § 21-5C-1, *et seq.*

Respondent's proposal is wholly unworkable where, as here, the existence of federal jurisdiction turns on the construction of a statute. If the appropriate rule of construction varied depending on whether a state law claim (as the principal claim, a supplemental claim, or a counterclaim) was present in a case, then the appropriate interpretation of a particular statute might (and would at times) vary as well. In the instant case, for example, because no state law claim is involved, Respondent insists that sections 216(b) and 1441(a) should be construed without regard to the rule of *Shamrock Oil*. But when, in a subsequent FLSA case, the plaintiff had also included a state law claim in his or her state court complaint, *Shamrock Oil* would apply, and might result in a different interpretation of those very sections. The construction of sections 216(b) and 1441(a), or of any other federal statute, should not vary in that manner.

Respondent urges that *Shamrock Oil* should not apply to federal claims because state judges lack familiarity with issues of federal law. (R.Br. 4, 24, 31-33)[3]. But state judges decide federal law questions, including federal constitutional issues, all the time. Respondent warns that the FLSA regulations are "enormously complex" (R.Br. 32), and that the particular regulation at issue in this case is "difficult to understand" (R.Br. 33), as if applying them might exceed the capacity of mere state court judges. But had Congress entertained doubts about the ability of state judges to competently apply the FLSA, it would have given federal courts exclusive jurisdiction over such actions, which it did not.

3

But see R.Br. at 33 ("Respondent does not mean to suggest that state court judges are incapable of interpreting the FLSA or the regulations promulgated pursuant to the statute.")

Respondent's suggestion that all federal judges (unlike state judges) are already experts in FLSA law is assuredly overstated[4]. Respondent argues, for example, that federal judges are more likely to be familiar with a particular FLSA regulation at issue in the instant case, 29 C.F.R. § 778.114. (R.Br. 32-33 and n. 19). But that regulation has been cited in only 49 federal opinions in the 45 years since it was adopted[5], which means that, as a practical matter, federal judges like state judges are unlikely to have had any prior experience with that regulation. More fundamentally, Respondent errs in suggesting that *Shamrock Oil* authorizes this Court to make a statute-by-statute assessment of the comparative expertise or competence of federal and state judges[6].

4

Respondent notes that there are an average of 367 reported federal decisions a year which cite the FLSA. (R.Br. 32 n. 14). At this rate a federal judge would have occasion to mention the FLSA in an opinion only once every two years. Furthermore, many of these decisions, of course, are actually claims arising under other statutes where the opinion merely happens to mention the FLSA.

5

The regulation was first adopted in January, 1968. 33 Fed. Reg. 986 (Jan. 26, 1968).

6

Respondent suggests that removal is necessary to permit consolidation in federal court where an employer on the same day is sued by two employees, one in federal court and one in state court, with similar FLSA claims. (R.Br. 34-35). Respondent does not, however, actually suggest that this implausible scenario has ever occurred.

Respondent suggests that *Shamrock Oil* should be inapplicable to federal claims because broader federal jurisdiction over such claims, including expanded removal jurisdiction, assures that questions regarding the meaning of federal law will benefit from "the consistency provided by the federal court system." (R.Br. 28). But the structure of the federal court system is no guarantee of consistency; the dispute at issue in this case regarding the interpretation of section 216(b) has divided the federal courts themselves for some sixty years. The thirteen federal courts of appeals often disagree about the interpretation of federal statutes, as do the hundreds of federal district judges. There is no reason then to assume that state court judges are more prone than their federal colleagues to interpret federal laws in a manner that would create a conflict which did not otherwise exist.

Finally, Respondent objects that if under *Shamrock Oil* federal courts do not have removal jurisdiction over FLSA claims, that would likely mean that federal courts would also lack removal jurisdiction over claims arising under the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Equal Pay Act, and the Employee Polygraph Protection Act. (R.Br. 25-28). But such a consequence would be a matter of concern only if there were a general presumption in favor of expanded federal removal jurisdiction.[7] The presumption dictated by the principles of federalism is precisely to the contrary.

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Furthermore, all these other federal acts suggested by Respondent, unlike the FLSA, were enacted after the enactment of 1441(a). As such, how the language of these post-1441(a) acts is applied and interpreted in light of 1441(a) is not at issue here and need not be resolved directly or indirectly by the Court's decision in this case.

II. SECTION 216(b) OF THE FAIR LABOR STANDARDS ACT, AS ORIGINALLY ENACTED, DID NOT PERMIT REMOVAL OF AN ACTION FILED IN STATE COURT UNDER THAT SECTION

In light of *Shamrock Oil* the dispositive question regarding section 216(b), as originally enacted[8], is whether it could reasonably be interpreted to preclude federal removal jurisdiction. Petitioner need not establish that such is the only possible interpretation of section 216(b), or even that--absent *Shamrock Oil*--it is the most likely interpretation[9]. Where there is more than one plausible interpretation of a statute, the very purpose of the *Shamrock Oil* rule of construction is to mandate

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Respondent objects that this portion of our opening brief asks the Court to interpret the original section 216(b) "in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a)." (R.Br. 12). But section 216(b) itself was enacted in 1938 "without regard to the express language of 28 U.S.C. § 1441(a)", since section 1441 was not adopted until 1947. The original meaning of section 216(b) assuredly must be determined without regard to section 1441(a). Whether section 1441(a) altered the meaning of section 216(b) is an important, but distinct, issue.

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This distinction provides the answer to the government's argument that section 216(b) should not be understood to bar a change of venue within a state court system. (U.S. Br. 13). Such a change of venue would not implicate the principles of federalism impinged upon by removal, and thus would not be subject to the rule of construction in *Shamrock Oil*.

the construction that will result in the narrower jurisdiction of the federal courts.

Respondent does not contend that the only reasonable interpretation of section 216(b) would be one permitting removal of FLSA actions. To the contrary, Respondent makes no claim that section 216(b) could not be interpreted to bar removal, but asserts only that such is not the sole possible interpretation of the section. Acknowledging that the term "maintain" was construed by *George Moore Ice Cream v. Rose*, 289 U.S. 373 (1933), in a manner that would preclude removal, respondent argues:

> the *George Moore* Court neither held nor implied that the word "maintain" cannot have meanings other than the one set out in the opinion . . . . "[M]aintain" has meanings other than the one identified by the *George Moore* Court. . . . [T]he word "maintain" has various meanings not just the one asserted by the Petitioner in this case. . . . [T]he word is reasonably susceptible to more than one competing meaning.

(R.Br. 15-16). The United States suggests section 216(b) "is most naturally" understood as allowing removal (U.S. Br. 10), but also characterizes the term "maintain" as "ambiguous." (U.S. Br. 8-10).

We explained in our opening brief why the use of the word "maintain" is most plausibly construed as meaning that FLSA actions filed in state court could be litigated there to final judgment. (Pet. Br. 13-27). That was the prevailing judicial interpretation of section 216(b) during the first decade after it was enacted in 1938. The reasonableness of that interpretation

is confirmed as well by the contemporaneous agency construction of the statute. The Administrator of the Wage and Hour Division, to whom Congress gave the authority to enforce and frame regulations implementing the FLSA, concluded in 1947 that section 216(b) precluded removal. (Pet. Br. 16). Such a contemporaneous interpretation of the statute is entitled to considerable weight. That agency interpretation remained unaltered for sixty-six years, until the Secretary of Labor decided to join the government's amicus brief in this case. (U.S.Br. 6 n.1). Originally, the Administrator read section 216(b) to contain "express language" precluding removal (*see* Pet. Br. 16); but now, however, the government is unable to find in that section even an implication of such a prohibition. (U.S.Br. 9-10). Even today, however, the United States does not disavow the Administrator's original characterization of the burdens that removal would place on FLSA plaintiffs. (*See* Pet. Br. 22).

Respondent objects that if section 216(b) were construed to bar removal, an "anomalous" situation would result, because some federal employment claims (such as Title VII) would be removable, while others (such as the FLSA) would not. But that is simply the inevitable result of the fact that Congress chose to frame these various statutes in different terms. Equally importantly, if section 216(b) precluded removal when it was first adopted in 1938, the subsequent enactment of Title VII (1965), ERISA (1974) and the Americans with Disabilities Act (1990) cannot have changed the meaning of the FLSA. (*See* R.Br. 28).

Even if, as we urge, "maintain" means "litigate to final judgment", the United States suggests that this would be consistent with removal because a plaintiff who commenced the action in state court is ultimately allowed to litigate it to final judgment, a lbeit in federal court. (U.S.Br. 11). But this is

surely a strained interpretation of section 216(b), which as originally enacted provided that an "[a]ction to recover . . . liability may be maintained in any court of competent jurisdiction." 52 Stat. 1069. This language clearly contemplates that the action will be maintained in a single court, not several courts in succession[10]. The assertion that "The Fair Housing Act guarantees a black couple the right to maintain an apartment in any state" does not mean that an Alabama landlord could evict such couples on the basis of race so long as they could still find open housing in San Francisco.

Finally, the United States argues that construing section 216(b) to bar removal would violate the presumption against repeals by implication because, in 1938, 28 U.S.C. § 71 (1934) provided for removal of "[a]ny" civil suit arising under federal law. (U.S.Br. 21-22)[11]. Our proffered interpretation of the

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The United States also suggests that once a notice of removal has been filed, the state court is no longer a "court of competent jurisdiction." (U.S.Br. 13-14). But this argument is circular since, if removal is held to be improper, this case will be remanded to state court. The state court lacks jurisdiction to proceed only so long as the removed case is pending in federal court. The government does not of course mean that an improper (e.g. untimely) notice of removal would permanently strip a state court of jurisdiction to hear a case.

11

As we noted in our opening brief, the apparent purpose of the 1948 Revision was to put an end to such arguments. (Pet. Br. 37). The government's invocation of that presumption is somewhat selective. If, as we urge, section 216(b) originally barred removal, that same presumption would necessarily counsel against acceptance of the government's contention that

original meaning of section 216(b), on the other hand, is supported by the maxim that "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

More importantly, in this instance the presumption against repeal by implication conflicts with the *Shamrock Oil* presumption in favor of the interpretation of federal law which narrows the jurisdiction of federal courts. In such a conflict the *Shamrock Oil* rule, which protects the core principles of federalism, must prevail.

III. THE 1947 REVISION OF THE JUDICIARY CODE DID NOT MAKE REMOVABLE THOSE ACTIONS PREVIOUSLY NON-REMOVABLE UNDER SECTION 216(b)

The interpretation of section 1441(a) is also governed by *Shamrock Oil.* The controlling question is whether section 1441(a) could reasonably be construed in a manner which left unaffected the non-removability of actions under section 216(b). The particular issue is whether the words "[e]xcept as otherwise expressly provided by Act of Congress" could have no possible meaning other than a requirement that any such statute refer in *haec verba* to removal.

Both respondent and the United States insist that a statute can satisfy the "expressly provided" clause only if it indeed refers to removal as such. Respondent suggests that this is the "plain and unambiguous meaning" of section 1441(a).

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the subsequent enactment of section 1441(a) modified section 216(b) by implication.

(R.Br. 19; *see id.* at 6 (section 1441(a) is "unequivocally clear", 11 (section 1441(a) is "unambiguous"), *but see id.* ("there is no way to determine the intended effect of the 1948 Amendments on the FLSA."). Similarly, the government argues that "there is no ambiguity in the breadth of the removal statute to which a principle of narrow construction would be relevant." (U.S.Br. 21).

This proposed reading of section 1441(a), however, is squarely inconsistent with this Court's longstanding interpretation of the similar language in 28 U.S.C. § 2283. Section 2283 forbids the federal courts from granting an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress." This is indistinguishable from the section 1441(a) proviso: "[e]xcept as otherwise expressly provided by Act of Congress." Section 2283, however, has never been understood to require that an Act of Congress relied on to permit such injunctions must expressly mention either "injunctions" or "state court."

As this Court explained in *Mitchum v. Foster*, 407 U.S. 225 (1972),

> [d]espite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope.

407 U.S. at 233-34. By 1948 this Court had recognized nine different circumstances in which injunctions could be granted against state proceedings. Three of these circumstances were not grounded on the terms of a particular Act of Congress. 407 U.S. at 235-36. Of the six statutes found sufficient to meet the

section 2283 proviso, 407 U.S. at 234, none mentioned the anti-injunction statute, and three made no specific mention of state proceedings. 407 U.S. at 237. "A federal law need not expressly authorize an injunction of a state proceeding in order to qualify as an exception [to section 2283.]" 407 U.S. at 237.

In interpreting the "expressly authorized" clause in section 2283, the touchstone has been not the particular language of the Act of Congress invoked but the underlying purpose of that statute:

> [I]n order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.

407 U.S. at 237-38 (footnote omitted).

Congress can be presumed to have been familiar with this interpretation of section 2283 when it utilized similar language in section 1441(a). But reliance on such a presumption is in this instance is unnecessary. In the same 1948 Revision of Title 28 which added section 1441(a), Congress also

amended section 2283 to endorse this Court's longstanding broad interpretation of the "expressly authorized" clause:

> In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which as the Reviser's Note makes evident, served not only to overrule the specific holding of *Toucey,* but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision.

407 U.S. at 236.

This broad understanding of what statutes satisfy the "expressly authorized" clause of section 2283, specifically endorsed by Congress when it enacted the 1948 Revision, should be utilized as well to construe the "expressly provided" clause of section 1441(a), enacted as part of that very same Revision. There is no meaningful distinction between the language of the two provisions. The differing approach to section 1441(a) urged by the United States would stand traditional principles of federalism on their head.

The "expressly authorized" clause of section 2283, which governs the authority of federal courts to interfere with state proceedings through the issuance of injunctions, has long been broadly construed, thus augmenting the power of federal courts. A similarly broad construction of the textually indistinguishable "expressly provided" language of section 1441(a) would have the virtue of protecting the states from

federal interference in the form of removal. What is sauce for the national government goose should be sauce for the federalism gander.

Even if the established interpretation of the "expressly authorized" clause of section 2283 does not mandate a similar interpretation of the "expressly provided" clause of section 1441(a), that is assuredly a plausible construction of section 1441(a). In such circumstances *Shamrock Oil* is controlling.

CONCLUSION

For the above reasons, the opinion of the court of appeals should be reversed, and the case remanded to the Circuit Court, in and for the Fourth Judicial Circuit, in and for Duval County, Florida.

Respectfully submitted,

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No. 02-337

In the Supreme Court of the United States

PHILLIP T. BREUER, PETITIONER

v.

JIM'S CONCRETE OF BREVARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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36 pp

QUESTION PRESENTED

The federal removal statute, 28 U.S.C. 1441(a), provides that, "[e]xcept as otherwise expressly provided by Act of Congress," any action in state court of which the federal district courts also have jurisdiction may be removed to federal district court. The Fair Labor Standards Act of 1938, in 29 U.S.C. 216(b), provides that an action to recover liability under the Act "may be maintained against any employer * * * in any Federal or State court of competent jurisdiction by any one or more employees." The question presented is whether such an action filed in state court under 29 U.S.C. 216(b) is subject to removal to federal court under 28 U.S.C. 1441(a).

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INTEREST OF THE UNITED STATES

The Secretary of Labor is charged with the responsibility of implementing and enforcing the Fair Labor Standards Act of 1938 (FLSA). See, *e.g.*, 29 U.S.C. 211, 216(c). The FLSA also authorizes private actions by employees to recover unpaid wages and liquidated damages for violations of the Act. 29 U.S.C. 216(b). The question presented is whether an employee's action that is filed in state court under 29 U.S.C. 216(b) is subject to removal to federal court under 28 U.S.C. 1441(a). The Secretary has an interest in ensuring that 29 U.S.C. 216 is interpreted correctly and in a way that is consistent with the enforcement

objectives of the FLSA. The Secretary of Labor also has an interest in this case because the Court's decision is likely to determine the right of removal under two other statutes that the Secretary administers that are worded similarly to 29 U.S.C. 216(b), the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2005(c)(2), and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2617(a)(2).

This Court's decision also may affect whether a defendant may remove an action brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, which is administered by the Equal Employment Opportunity Commission. 29 U.S.C. 625; 29 C.F.R. 1626.15(a). The ADEA provides that an aggrieved person "may bring a civil action in any court of competent jurisdiction," 29 U.S.C. 626(c), and that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in [29 U.S.C. 216]." 29 U.S.C. 626(b).

STATEMENT

1. Petitioner sued respondent, his former employer, in Florida state court for unpaid overtime wages, liquidated damages, prejudgment interest, and attorney's fees under the FLSA, 29 U.S.C. 216(b). Pet. App. 1a-2a. Section 216(b) makes an employer that violates the minimum wage and overtime provisions of the Act liable to the affected employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). Section 216(b) further provides that "[a]n action to recover the liability prescribed [in Section 216(b)] may be maintained against any employer (including a public agency) in any Federal or State court of competent

jurisdiction by any one or more employees." 29 U.S.C. 216(b).

Respondent removed the action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. 1441. Pet. App. 2a. That section provides that, "[e]xcept as otherwise expressly provided by Act of Congress," an action of which the federal district courts have original jurisdiction may be removed by the defendant to federal district court. 28 U.S.C. 1441(a). Petitioner moved to remand the case, arguing that the language in the FLSA stating that an action "may be maintained" in state or federal court constitutes an "expressly provided" exception to the right of removal under 28 U.S.C. 1441(a). Pet. App. 2a.

2. The district court denied petitioner's motion to remand, and certified the issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 2a, 8a-9a.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-6a. The court of appeals "adopt[ed] the reasoning" of the First Circuit in *Cosme Nieves* v. *Deshler*, 786 F.2d 445, cert. denied, 479 U.S. 824 (1986), which "held that without an 'explicit statutory directive by Congress,' FLSA cases may be removed from state court to federal court, and that § 216(b) was not such an express statutory prohibition against removal." Pet. App. 3a (quoting *Cosme Nieves*, 786 F.2d at 451). The court of appeals observed that, in other statutes where Congress has expressly prohibited removal, "it did so in direct, unequivocal language." *Id.* at 5a.

SUMMARY OF ARGUMENT

Suits under the Fair Labor Standards Act are ones over which federal courts unquestionably have original subject matter jurisdiction. 29 U.S.C. 216(b); 28 U.S.C.

1331, 1337. As such, the federal removal statute, 28 U.S.C. 1441(a), authorizes removal of such actions "except as otherwise expressly provided by Act of Congress." The provision of the FLSA authorizing employee actions, 29 U.S.C. 216(b), provides that "[a]n action to recover * * * may be maintained against any employer * * * in any Federal or State court of competent jurisdiction." That language does not expressly prohibit removal, as other federal statutes have done when Congress intended to foreclose a federal court's removal jurisdiction.

The word "maintain" in Section 216(b) does not, expressly or otherwise, communicate an intent to foreclose removal. By authorizing an employee to maintain suit in state or federal court, Section 216(b) provides a right of action over which federal and state courts have concurrent jurisdiction. Although the word maintain may imply a right to litigate a cause of action to final judgment, removal of an action does not impair that right; removal merely transfers the case from state court to federal court, where the employee's right of action may be litigated to final judgment. Moreover, Congress enacted the FLSA against the backdrop of the defendant's long-standing right to remove "[a]ny" suit arising under federal law, Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094 (codified at 28 U.S.C. 71 (1934)), and Congress therefore presumably intended that employee actions filed in state court would be subject to the defendant's pre-existing right of removal. Petitioner's remaining contentions also do not provide a basis for concluding that the FLSA expressly prohibits removal.

ARGUMENT

EMPLOYEE ACTIONS FILED IN STATE COURT UNDER THE FAIR LABOR STANDARDS ACT MAY BE REMOVED TO FEDERAL COURT

The general removal statute, 28 U.S.C. 1441, provides that, "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States." 28 U.S.C. 1441(a). The removal statute also provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the * * * laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. 1441(b).

Employee actions under the FLSA, 29 U.S.C. 216(b), are indisputably within the original jurisdiction of the district courts of the United States. By providing in 29 U.S.C. 216(b) that an employee action "may be maintained * * * in any Federal * * * court of competent jurisdiction," the Act confers jurisdiction on federal courts over FLSA claims. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 390 & n.3 (1942). Moreover, because the FLSA is an Act of Congress regulating commerce, federal courts have federal question jurisdiction, 28 U.S.C. 1331, 1337, over suits brought to enforce the FLSA. Accordingly, employee actions under the FLSA are subject to removal unless the FLSA "expressly provide[s]" an exception to removal. 28

U.S.C. 1441(a). Nothing in the FLSA, however, contains an express bar to removal.[1]

A. The FLSA's Use Of The Word "Maintain" Does Not Provide An Express Exception To Removal

1. Section 1441(a) authorizes removal of civil suits within a federal district court's original jurisdiction unless removal is "expressly" foreclosed by an Act of Congress. The ordinary or common understanding of the word "expressly" is "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* 601 (7th ed. 1999); *Webster's (Third) New International Dictionary* 803 (1993) ("in direct or unmistakable terms * * * explicitly, definitely, directly"). Thus, the statutory text must be explicit in foreclosing removal of an action otherwise within a federal court's removal jurisdiction. As this Court has explained in other contexts, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

[1] In 1947, the Department of Labor, on behalf of the Administrator of the Wage and Hour Division, filed an amicus brief in the Eighth Circuit in *Johnson* v. *Butler Bros.*, 162 F.2d 87 (1947), arguing that the policies underlying the FLSA and the text of the Act supported the conclusion that an employee may maintain an action under 29 U.S.C. 216(b) without the possibility of removal of the suit to federal court. Since that time, Congress has amended the removal statute to provide that cases falling within the federal court's original jurisdiction are subject to removal "[e]xcept as otherwise expressly provided by Act of Congress." Act of June 25, 1948, ch. 646, 62 Stat. 937. In light of that amendment, and upon further consideration, the Secretary has concluded that FLSA actions brought by employees are subject to removal.

Section 1441(a)'s requirement of an express bar to removal has been satisfied in numerous other instances in which Congress has foreclosed removal "in direct, unequivocal language." Pet. App. 5a. Thus, 28 U.S.C. 1445 is entitled "*[n]onremovable actions*" and provides:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under [the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*], *may not be removed* to any district court of the United States.
>
> (b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, *may not be removed* to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.
>
> (c) A civil action in any State court arising under the workmen's compensation laws of such State *may not be removed* to any district court of the United States.
>
> (d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 *may not be removed* to any district court of the United States.

28 U.S.C. 1445 (emphasis added); see also *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001) (action under the Jones Act, 46 U.S.C. App. 688(a), is not subject to removal because the Jones Act incorporates the FELA's prohibition against removal).

Congress elsewhere has used similarly explicit language to foreclose the exercise of the federal court's

removal jurisdiction. 15 U.S.C. 77v(a) ("*No case* arising under this subchapter [of the Securities Act of 1933] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States.") (emphasis added); 15 U.S.C. 1719 ("*No case* arising under [Interstate Land Sales Full Disclosure Act] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party.") (emphasis added); 15 U.S.C. 3612 ("*No case* arising under [the Condominium and Cooperative Abuse Relief Act of 1980] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States, except where any officer or employee of the United States in his official capacity is a party.") (emphasis added).

As a basis for finding an express exception to removal, petitioner relies on the provision in the FLSA that authorizes employee actions, 29 U.S.C. 216(b), which provides that "[a]n action to recover * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. 216(b). That language, however, does not even intimate that it is concerned with the issue of removal, much less provide the express exception to the right of removal that Congress has provided in other statutes. See *Hill* v. *Moss-American, Inc.*, 309 F. Supp. 1175, 1178 (N.D. Miss. 1970) ("No mention of removal is made in the [FLSA] itself and no reference is made to it in the general removal or other federal statutes."); 1A James W. Moore, *Moore's Federal Practice* ¶ 0.167[5], at 472 (2d ed. 1996) ("[T]he provision of the [FLSA] that the employee's suit 'may be maintained in any court of

competent jurisdiction' * * * [is an] ambiguous phrase [and] is certainly not an express provision against removal within the meaning of § 1441."); see also 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3729, at 235 (1998) (referring to "use of the ambiguous term 'maintain' in the statute").

This Court has recognized that, where Congress has given explicit treatment to an issue in other statutes, the absence of similar language in the particular statute at hand is strong evidence bearing on congressional intent. *E.g.*, *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (in light of "explicit requirement" of overt act requirement in general conspiracy statute, 18 U.S.C. 371, Congress's "silence" on the issue in drug conspiracy statute, 18 U.S.C. 846, "speaks volumes"); accord *Custis* v. *United States*, 511 U.S. 485, 492 (1994); *Palmore* v. *United States*, 411 U.S. 389, 395 & n.5 (1973). That same principle is equally true here. "If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here." *Cosme Nieves*, 786 F.2d at 451 (footnote omitted).

2. Petitioner argues (Br. 8, 30, 31) that the requirement in 28 U.S.C. 1441(a) that a prohibition against removal be "expressly provided" may be satisfied so long as the prohibition is "grounded" in some "text" of an Act of Congress, and that the word "maintain" in the text of Section 216(b) supplies a sufficient basis for finding such a prohibition under the FLSA. Because the word "maintain," however, does not in express terms even address removal, petitioner's argument, at bottom, is that the necessary *implication* of the word "maintain" prohibits removal. But Section 1441(a) requires an *express* exception in an Act of Congress. Thus, an inference from a word that is at best ambigu-

ous is insufficient. Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.").

In any event, there is no basis for inferring from the word "maintain" in the FLSA that Congress intended to prohibit removal. By providing that "[a]n action to recover * * * may be maintained * * * in any Federal or State court of competent jurisdiction," Section 216(b) is most naturally understood to confer on an employee a right to sue, and to file the action in either a state or federal court of competent jurisdiction. "To maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action." *Black's Law Dictionary* 1143 (3d ed. 1933). Congress thus often has used the term "maintain" to grant a substantive cause of action,[2] or conversely, to

[2] *E.g.*, 7 U.S.C. 2106(e)(6), 2707(e)(3), 3405(e) (Secretary of Agriculture "may maintain a suit" to collect certain assessments); 15 U.S.C. 2805(a) (franchisee "may maintain a civil action" against a franchiser with respect to certain petroleum marketing); 16 U.S.C. 416 (United States "may maintain an action" to recover certain leased premises in military parks); 26 U.S.C. 7402(c) (federal employees injured in discharging their duties under Internal Revenue Code may "maintain an action for damages"); 43 U.S.C. 620m, 1551(c) (states "may maintain an action" in the Supreme Court to enforce certain federal obligations concerning the Colorado River); 46 U.S.C. App. 688(a) (seaman may "maintain an action for damages"); 46 U.S.C. App. 761(a) (representative of person who died on high seas "may maintain a suit for damages in the district courts of the United States"); 46 U.S.C. App. 764 ("right of action" granted by foreign law for death on high seas "may be maintained" in the courts of the United States); 46 U.S.C. App. 1242(d) (persons who hold mortgages, maritime claims, or attachment liens on vessels seized by government during national

foreclose one.[3] Indeed, Congress used the term "maintain" to refer to a cause of action even before the passage of the FLSA. *E.g.*, Act of Apr. 5, 1910, ch. 143, 36 Stat. 291 (codified at 45 U.S.C. 56); Act of Mar. 3, 1897, ch. 372, § 4, 29 Stat. 622 (codified at 16 U.S.C. 416). This Court, too, often has employed the term "maintain" to refer to a right of action. *E.g.*, *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (describing trustee's common law right to "maintain an action for restitution"); *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 200-201 (1997) (explaining that under 29 U.S.C. 1451(a), "[a] plan cannot maintain an action until the employer misses a scheduled withdrawal liability").

A right of action, of course, generally carries with it the authority to litigate a suit to final judgment. But the right to litigate an action to final judgment does not foreclose, expressly or otherwise, removal of the action to federal court, where it thereafter may be litigated to final judgment. Petitioner therefore errs in relying on this Court's recognition that "[t]o maintain a suit is to uphold, continue on foot, and keep from collapse a suit

emergency may "maintain" an action for compensation); 48 U.S.C. 1421i(h)(2) (suit may "be maintained" in federal courts against government of Guam for improperly assessed taxes).

[3] *E.g.*, 15 U.S.C. 77p(b), 78bb(f)(1) (no class actions concerning certain securities violations "may be maintained"); 26 U.S.C. 7422(a) and (b) (no suit for tax refund may "be maintained" until claim for refund or credit has been filed, but suit "may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress"); 45 U.S.C. 56 ("No action shall be maintained under [FELA] unless commenced within three years from the day the cause of action accrued."); 46 U.S.C. App. 688(b) ("No action may be maintained" with respect to certain injuries or death of a person who was not a citizen or permanent resident alien of the United States.).

already begun." *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 377 (1933) (quoting *Smallwood* v. *Gallardo*, 275 U.S. 56, 61 (1927)).[4] That meaning has nothing to do with the *transfer* of an action from one court of competent jurisdiction to another, pursuant to a removal statute of general applicability. Removal to federal court does not collapse or terminate the action; removal simply transfers the action to a federal forum where the suit thereafter can be "maintained" to final judgment.[5]

3. The text of the relevant sentence of Section 216(b) as a whole further undermines petitioner's argument that the word "maintain" grants an employee an absolute right to continue to litigate his action to final judgment in the court in which the suit is originally filed. By providing that an employee action "*may be* maintained * * * in any Federal *or* State court of competent jurisdiction," 29 U.S.C. 216(b) (emphasis

[4] Neither *Rose* nor *Smallwood* addressed a federal court's removal jurisdiction but rather the effect of the word "maintain" on pending lawsuits. *Smallwood*, 275 U.S. at 61, held that a statute directing that no suit seeking to restrain taxes imposed under the laws of Puerto Rico "shall be maintained" applied to actions pending before Congress enacted the statute. *Rose*, 289 U.S. at 377, similarly observed that "maintain" commonly covers "pending actions."

[5] For similar reasons, petitioner errs in relying (Br. 16-17) on a provision in the original 1938 Act that permitted an employee to designate an agent or representative "to maintain" the employee's action. Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1069; see also Portal-to-Portal Act of 1947, ch. 52, § 5(a), 61 Stat. 87 (repealing representative actions); *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 172-173 (1989) (discussing history of representative and collective actions under 29 U.S.C. 216(b) as incorporated into the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626(b)).

added), the FLSA expresses no preference for the forum in which an employee action may proceed, and the Act contains no mandate that the employee's initial choice of forum must prevail over the defendant's express right of removal under 28 U.S.C. 1441(a). Such a construction also would violate this Court's "longstanding practice of construing statutes *in pari materia*." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Under that principle, the FLSA must be read in conjunction with other federal statutes that explicitly permit transfer of a suit from one forum to another. For instance, an FLSA action that is filed in a particular forum is presumably subject to that forum's law allowing a defendant to seek a transfer of venue when transfer serves the interest of justice. *E.g.*, 28 U.S.C. 1404; Ala. Code. § 6-3-20 (1993); Alaska Stat. § 22.15.080 (Michie 1995); Fla. Stat. Ann. § 47.122 (West 1994); Wis. Stat. Ann. § 801.52 (West 1994).

The same is true with respect to transfer by removal. Indeed, the language in Section 216(b) that an action may be maintained "in any Federal or State court of competent jurisdiction" indicates that Section 216(b) and suits brought under it take the jurisdiction of the courts as they find them, and that Section 216(b) itself was not intended to alter jurisdictional rules that are established elsewhere. As this Court explained in construing comparable language in the FELA, a state court is one of "competent jurisdiction" when "its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion." *Second Employers' Liab. Cases*, 223 U.S. 1, 56-57 (1912). But where another federal statute—here, 28 U.S.C. 1441(a)—ousts a state court of its jurisdiction upon the filing of a notice in federal district court (see 28 U.S.C. 1446(a)), the state court is no longer one of "competent jurisdiction" with

respect to the case, and the plaintiff thereafter must "maintain" his action, if at all, in the federal district court, which of course *is* a court of "competent jurisdiction."

It is significant, moreover, that Congress passed the FLSA against the backdrop of a pre-existing and long-standing right of a defendant to remove a case arising under federal law to federal district court. In 1875, Congress first created federal question removal jurisdiction by granting defendants the right to remove "*any*" suit arising under federal law in which the matter in controversy exceeded $500. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470 (emphasis added). Although "[t]he legislative history of the federal question removal provision is meager, * * * it has been suggested that its purpose was the same as original federal question jurisdiction, enacted at the same time in the Judiciary Act of 1875, 18 Stat. 470, namely, to protect federal rights, and to provide a forum that could more accurately interpret federal law." *Boys Mkts., Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 246 n.13 (1970) (citations omitted).

By the time Congress passed the FLSA in 1938, the right of removal was codified in 28 U.S.C. 71 (1934), and extended to "[*a*]*ny* suit of a civil nature * * * arising under the * * * laws of the United States" of which the district courts had original jurisdiction. Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094 (emphasis added). That all-encompassing language plainly included suits such as those under the FLSA. Morever, prior to 1938, when Congress wanted to carve out exceptions to that right of removal, it did so expressly. See Act of Apr. 5, 1910, ch. 143, 36 Stat. 291 (28 U.S.C. 1445(a)); Act of Jan. 20, 1914, ch. 11, 38 Stat. 278 (28 U.S.C. 1445(b)); Securities Act of 1933, ch. 38, § 22(a), 48 Stat. 86-87 (15 U.S.C. 77v(a)). The absence of any such express exception in the FLSA therefore is telling.

In 1948, Congress re-codified the removal statute in 28 U.S.C. 1441(a), which authorizes removal over civil suits within the district courts' original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." Act of June 25, 1948, ch. 646, § 1441(a), 62 Stat. 937; see also 28 U.S.C. 1441 (historical and revision notes). Those provisions, coupled with the FLSA's complete silence on the issue of removal, leave no reason to doubt that Congress understood that FLSA employee actions filed in state court would be subject to removal to federal court.[6]

B. The FLSA's Use Of The Word "Bring" In Other Provisions Does Not Suggest That The Word "Maintain" In Section 216(b) Expressly Bars Removal

1. Petitioner relies (Br. 17-21) on Congress's use of the term "bring" in various provisions of the FLSA and in other federal statutes. Petitioner argues that a right to "bring" suit refers to the initiation of a suit and therefore does not foreclose removal of the case from the state court in which it was initially brought. Br. 17-18. Petitioner then argues that Congress's use of the different word "maintain" in authorizing employee actions under Section 216(b) reflects a deliberate intent on the part of Congress to confer on an employee a

[6] Petitioner argues (Br. 38-40) that Congress in passing the FLSA could not have known it would be required to foreclose removal in explicit terms because the language in the removal statute requiring an express exception was not added until 1948, after the FLSA was enacted. As the examples cited in the text demonstrate, however, even before 1938 Congress had foreclosed a federal court's removal jurisdiction with direct and explicit language.

right to pursue, or "maintain," previously filed suits through to final judgment, and hence, in petitioner's view, to defeat removal. Br. 19-21. For the reasons discussed above, a plaintiff's right under Section 216(b) to litigate a suit to final judgment says nothing about the defendant's right under a different statute to remove the case to federal court. The word "maintain" therefore does not constitute an express bar to removal.

2. That conclusion is not altered by any of the specific references in the FLSA to the right to "bring" suit.

a. Three provisions of the FLSA authorize the Department of Labor to "bring" suit to enforce provisions of the Act.[7] The Secretary's right to "bring" suit, like the employee's right to "maintain" suit, simply conveys the existence of a cause of action in court. *American Heritage Dictionary* 232 (4th ed. 2000) (defining "bring" to mean "[t]o advance or set forth (charges) in a court."). Indeed, the FLSA in Section 204(f) uses the term "bring" to describe the *employee's* right of action under Section 216(b). 29 U.S.C. 204(f) (providing that Office of Personnel Management's authority to administer FLSA with respect to certain federal employees "shall [not] affect the right of an employee to *bring* an

[7] See 29 U.S.C. 211(a) ("[T]he Administrator shall bring all actions under [S]ection 217 of this title to restrain violations of this chapter."); 29 U.S.C. 212(b) ("The Secretary of Labor * * *, subject to the direction and control of the Attorney General, shall bring all actions under [29 U.S.C. 217] to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor."); 29 U.S.C. 216(c) ("The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.").

action * * * under section 216(b) of this title.") (emphasis added).

Moreover, the Secretary's authority to "bring" suit, like the employee's authority to "maintain" suit, necessarily carries with it the general ability to litigate the action to final judgment. There is accordingly no basis for attaching talismanic effect to Congress's use of the word "maintain" rather than "bring" in Section 216(b), either in general or specifically with respect to removal. It follows a fortiori that there is no basis for concluding that Congress's use of "maintain" rather than "bring" constitutes an express exception to the right of removal conferred by 28 U.S.C. 1441(a).[8]

b. Section 216 also provides that the Secretary's filing of a suit for monetary damages under 29 U.S.C. 216(c) or for restitutionary injunctive relief under 29 U.S.C. 217 terminates the employee's right to "bring"

[8] One possible explanation for the different terminology in 29 U.S.C. 216(c) is that Section 216(c) was not part of the original Act but was added by amendment in 1949. Act of Oct. 26, 1949, ch. 736, § 14, 63 Stat. 919. The original Act did confer on the government a right to "bring" suit, now codified under 29 U.S.C. 211(a) and 212(b), but the language originated in 1937 bills that entitled employees to "recover * * * reparation in a civil action" over which state and federal courts had concurrent jurisdiction. S. 2475, 75th Cong., 1st Sess. §§ 13, 15(b), 18(b), 22 (July 6, 1937) (reported Senate bill); see also S. Rep. No. 884, 75th Cong., 1st Sess. 8-9 (1937); H.R. Rep. No. 1452, 75th Cong., 1st Sess. 10, 18-19 (1937). The conference committee carried forward the provisions authorizing the government to "bring" suit and authorized an employee action using the "may be maintained" language now set forth in Section 216(b). H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 8-9, 11, 32-33 (1938). There is no indication that Congress attached any significance to the difference in terminology, and it thus appears that Congress used "bring" and "maintain" interchangeably to refer to a right of action. See pp. 23-25, *infra*.

an employee action under 29 U.S.C. 216(b). 29 U.S.C. 216(b) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under [S]ection 217 [for back wages for such employee]."); 29 U.S.C. 216(c) ("The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection [for back wages or liquidated damages for such employee].").

As petitioner notes (Br. 18 & n.9), when the Secretary files suit for monetary relief for individual employees under Section 216(c) or 217, it has been understood that the employee's right of action under Section 216(b) terminates with respect to suits not yet filed but not with respect to actions pending at the time the Secretary files suit. *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1207 (5th Cir. 1981); accord H.R. Conf. Rep. No. 327, 87th Cong., 1st Sess. 20 (1961) (filing of the Secretary's complaint does "not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff *before* the Secretary's action") (emphasis added); S. Rep. No. 145, 87th Cong., 1st Sess. 39 (1961) (Secretary's filing of complaint "terminates the rights of individuals to *later* file suit") (emphasis added); H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961) (same); cf. *Smallwood*, 275 U.S. at 61. The FLSA's termination provisions, however, provide no basis for finding an intent to foreclose removal. As discussed, a right to litigate an action

already pending is entirely consistent with the removal of such an action to federal court under 28 U.S.C. 1441(a).

c. A variation of the word "bring" also appears in the collective action provisions of Section 216(b) that authorize an employee or employees to bring collective actions "in behalf of himself or themselves and other employees similarly situated." See generally *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989). Section 216(b) provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is *brought*." 29 U.S.C. 216(b) (emphasis added)). That provision is consistent with removal of a collective action under the FLSA. If an employee files a collective action that is subsequently removed to federal court, any employee who thereafter consents to become a party plaintiff may file his consent in federal court.

The phrase "court in which such action is brought" is reasonably understood to mean the court in which the employee's suit is pending, *i.e.*, the court in which the employee's right of action is being litigated at the time consent is filed. *Anson* v. *University of Tex. Health Sci. Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992) ("Under Section 216(b), an employee may become an 'opt-in' party plaintiff to an already filed suit by filing written consent with the court where the suit is pending."); cf. *Linthicum* v. *Calvin*, 57 S.W.3d 855, 858 (Mo. 2001) (per curiam) ("Although a suit is 'brought' against the original defendants when [a complaint] is initially filed, in like manner, it is also 'brought' against subsequent defendants when they are added to the lawsuit by amendment."); *American Fin. Co.* v. *Bostwick*, 23 N.E. 656, 659 (Mass. 1890) (for purposes of section of federal

removal statute that required petition for removal to be filed in state court in which "suit is brought," "[t]he section plainly means that the petition must be filed in the suit, and therefore it must be filed in the court where the suit is pending when it is filed," such that transfer among state courts does not defeat right of removal). In any event, to the extent that the phrase "is brought" in Section 216(b) is ambiguous on this particular subsidiary point, it does not render Section 216(b) an explicit exception to the federal removal statute.[9]

C. The Principle That Removal Legislation Should Be Narrowly Construed Does Not Defeat A Defendant's Right To Remove An Action Under Section 216(b)

Invoking the principle that removal legislation should be narrowly construed (*e.g.*, *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941)), petitioner argues (Br. 9-13, 28-38) that because the requirement in 28 U.S.C. 1441(a) for an "express[]" exception to removal was not added to the removal statute until 1948, after

[9] For purposes of the applicable statute of limitations for collective actions, an action is commenced (a) when the complaint is filed, if the person is named in the complaint and files his consent to be a party plaintiff "in the court in which the action is brought," or, (b) when those conditions are not satisfied, "on the subsequent date on which such written consent is filed in the court in which the action was commenced." 29 U.S.C. 256. That provision, too, is reasonably construed to mean that, when an employee joins a pending collective action, "his action commences when he opts into the action by filing written consent with the court in which the action is pending." *O'Connell* v. *Champion Int'l Corp.*, 812 F.2d 393, 394 (8th Cir. 1987); see also S. Rep. No. 48, 80th Cong., 1st Sess. 49 (1947) ("[A]s to any individual claimant in any such collective action, the action is deemed to be commenced as to him when he is named a party thereto.").

the enactment of the FLSA, see note 1, *supra*, the removal statute should be narrowly construed "not * * * to permit the removal of previously non-removable actions" under the FLSA as it existed before 1948. Br. 31. That analysis is seriously flawed.

1. Section 1441(a), as it is *currently* written, governs this case, and the plain terms of that statute mandate its application to "*any* civil action" of which federal district courts have original jurisdiction, "[e]xcept as otherwise expressly provided by an Act of Congress." 28 U.S.C. 1441(a) (emphasis added); cf. *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) ("A statute that begins with 'Except as otherwise provided by law' creates a general rule that applies unless contradicted in some other provision."); compare *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (phrase "*any* property" is "broad and unambiguous" and "comprehensive"). Furthermore, because actions brought under 29 U.S.C. 216(b) unquestionably fall within the original jurisdiction of the federal district courts, there is no ambiguity in the breadth of the removal statute to which a principle of narrow construction would be relevant. In short, because nothing in the text of the FLSA bears the weight of an express exception to removal, this Court's inquiry is at an end.

2. Moreover, petitioner's premise—that, before 1948, Congress intended to bar removal of FLSA suits—is fundamentally wrong. When it passed the FLSA in 1938, Congress did not *expressly* repeal a defendant's right of removal that previously existed under 28 U.S.C. 71 (1934) for "[a]ny" civil suit arising under federal law. See pp. 14-15, *supra*. Accordingly, the only basis for accepting petitioner's contention that Congress in 1938 intended to prohibit a federal court's removal jurisdiction over FLSA suits is by *implication*.

That contention, however, not only violates the plain terms of the current removal statute requiring an "express[]" exception to the general right of removal, 28 U.S.C. 1441(a); it also violates the "cardinal rule * * * that repeals by implication are not favored," *Cook County* v. *United States ex rel. Chandler*, No. 01-1572 (Mar. 10, 2003), slip op. 12 (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and will not be found unless an intent to repeal is "clear and manifest." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Red Rock* v. *Henry*, 106 U.S. 596, 602 (1883)). "When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. * * * Especially is this rule to control when it appears that Congress in some cases has made express provision for effecting a change." *Rosencrans* v. *United States*, 165 U.S. 257, 262 (1897).

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). In other words, "where [the] two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017-1018 (1984) (citation omitted); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868).

Section 216(b) of the FLSA and the removal statute are clearly "capable of co-existence." *Ruckelshaus*, 467 U.S. at 1018. As discussed, an employee who files suit under the FLSA in state court, which the employer

subsequently removes to federal court, has the right to maintain his action in federal court and to obtain the full remedies set forth under the FLSA, including the unpaid wages, liquidated damages, costs, and attorney's fees. 29 U.S.C. 216(b). Cf. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 808 (1976) (holding that McCarran Amendment, 43 U.S.C. 666, which consents to the naming of the United States as a defendant in suits involving federal water rights, "did not constitute an exception 'provided by Act of Congress' that repealed the jurisdiction of district courts under [28 U.S.C.] 1345 to entertain federal water suits").

D. Petitioner's Reliance On Subsequent Legislative History And Policy Arguments Do Not Furnish A Basis For Finding That The FLSA Expressly Bars Removal

1. a. We are aware of nothing in the legislative history of the FLSA, as enacted or as amended, that addresses the issue of removal. In 1937, the Senate passed a bill that would have allowed employees to recover unpaid wages (termed "reparations") in a civil action and separately conferred concurrent state and federal court jurisdiction over such actions. See S. 2475, *supra*, §§ 18, 22 (reported Senate bill); S. 2475, 75th Cong., 1st Sess. §§ 18, 22 (July 31, 1937) (Senate-passed bill, which was referred to the House of Representatives). The Senate provisions were explained as "provid[ing] for the payment of reparation" and "confer[ring] appropriate jurisdiction on the district courts." S. Rep. No. 884, 75th Cong., 1st Sess. 9 (1937). The House Labor Committee initially reported a bill with the same provisions. See S. 2475, 75th Cong., 1st Sess. §§ 18, 22 (Aug. 6, 1937) (reported House bill). The accompanying House Report stated only that "[t]he bill

specifically grants the employee a right of action." H.R. Rep. No. 1452, 75th Cong., 1st Sess. 10 (1937); *id.* at 19 (discussing payment of "reparation").

The House of Representatives did not pass the reported bill, but instead sent it back to committee. 82 Cong. Rec. 1834-1835 (1937). The House Labor Committee then reported another bill that provided no employee enforcement mechanisms. S. 2475, 75th Cong., 3d Sess. (Apr. 21, 1938) (reported bill); H.R. Rep. No. 2182, 75th Cong., 3d Sess. (1938). The House passed that bill without adding any employee enforcement mechanisms. 83 Cong. Rec. 7441-7450 (1938) (House passage). The conference committee later drafted the language that Congress ultimately enacted as Section 216(b), which provided that an action "may be maintained in any court of competent jurisdiction." H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 11 (1938). The committee explained that Section 216(b) "provides for civil reparations for violations of the wages and hours provisions." *Id.* at 33.[10]

The legislative history accompanying later amendments to Section 216 similarly contains no reference to removal but merely refers to the employee's right to bring suit. See H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947) (banning representative actions but explaining that "[c]ollective actions brought by an employee * * * may continue to be brought"); 95 Cong. Rec. 12,487, 12,488 (1949) (statement of Sen. Humphrey) (discussing amendment to permit suit by the

[10] In 1974, Congress replaced the phrase "any court of competent jurisdiction" in Section 216(b) with "any Federal or State court of competent jurisdiction" at the same time that Congress amended the FLSA to give employees the right to sue "a public agency." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 61; see *infra*, p. 25.

Secretary to collect unpaid wages and referring to existing law as allowing only the employee to "bring suits," "to bring civil action" or to "sue"); S. Rep. No. 145, 87th Cong., 1st Sess. 39 (1961) (referring to employee's right "to bring an action"); H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961) (same); S. Rep. No. 690, 93d Cong., 2d Sess. 27, 56 (1974) (amendment giving employees right to "maintain" or "to bring private actions" against public agencies); H.R. Rep. No. 913, 93d Cong., 2d Sess. 45 (1974) (amendment makes clear that suits by public employees "may be maintained" because the previous law had not explicitly stated that "State and local employees could bring an action").

In sum, the FLSA's legislative history is fully consistent with the natural reading of Section 216(b) as giving an employee a right of action over which state and federal courts have concurrent jurisdiction, subject to whatever other statutes (including the federal removal statute) regulate the jurisdiction of those courts.

b. Petitioner relies (Br. 40-41) on the Senate Report accompanying the 1958 enactment of 28 U.S.C. 1445(c) to bar removal of workers' compensation actions under state law. That Report states:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court.

S. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958).

That legislative history, of course, does not constitute an express exception to removal "in an Act of Congress," as required by 28 U.S.C. 1441(a). Moreover, the Senate Report, which relates to 28 U.S.C. 1445(c) and was prepared many years after the enactment of the FLSA, hardly provides persuasive evidence of congressional intent. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight * * * and the views of the committee of one House of another Congress are of even less weight").

2. Petitioner also argues (Br. 22-27) that Congress when it passed the FLSA likely intended to foreclose removal because removal might have burdened employees who had claims involving small amounts and who did not have ready access to the federal courts. Those policy concerns, however, do not necessarily apply in all FLSA cases. As the district court explained in *Hill* v. *Moss-American, Inc.*:

> Nor can one fairly categorize [FLSA] actions. Barring removal of [FLSA] cases will shut out controversies involving dollar amounts ranging from quite large to very small, concerning interpretations of an Act of Congress ranging from difficult to routine, between persons who may or may not be of diverse citizenship, in localities where the congestion of trial dockets as between state and federal courts may be great or unremarkable.

309 F. Supp. at 1178.

Moreover, FLSA actions are not clearly in a category that distinguishes them from other employment-related suits arising under other federal statutes that are

subject to removal to federal court, irrespective of the amount in controversy or the potential inconvenience to the employee from removal. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987) (suit for benefits under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(1)(B), 1132(e)(1)); *Avco Corp.* v. *Aero Lodge, No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968) (Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185); *Hirschbiel* v. *Johnson*, 118 F. Supp. 2d 903, 905 (N.D. Ind. 2000) (Title VII, 42 U.S.C. 2000e *et seq.*); *Keil* v. *CIGNA*, 978 F. Supp. 1365 (D. Colo. 1997) (Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*).

Finally, regardless of whether removal of FLSA actions is good policy, it is the responsibility of Congress to weigh the relevant policy considerations and to determine whether to carve out an exception for FLSA cases to the general statutory right of a defendant to remove to federal court a case arising under federal law. *E.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992). Because Congress has not passed a law that forecloses removal of FLSA actions in express statutory language, as required by 28 U.S.C. 1441(a), such actions are subject to removal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2003

MAR. 17 2003

No. 02-337

IN THE

Supreme Court of the United States

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE ACADEMY OF FLORIDA MANAGEMENT ATTORNEYS, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Federal Rule of Civil Procedure 23 12

INTEREST OF *AMICUS CURIAE*[1]

The Academy of Florida Management Attorneys, Inc. (AFMA) is a voluntary bar association which was established as a forum allowing for the free exchange of ideas and knowledge among the senior management labor and employment bar of the State of Florida. The membership consists of experienced management labor and employment attorneys who devote substantially all of their professional activities to advice and advocacy on behalf of Florida employers.

The issue at stake in this case is of direct concern to the AFMA and its members. Clients of the AFMA's members are defendants in numerous labor and employment cases filed each year. Many of these cases, including those based in whole or in part on Federal law, are originally filed in state courts, and many of these are in turn removed by defendant employers to U.S. district courts. Were the Court to adopt the strained reading of the general removal statute that Petitioner urges, the AFMA's members' clientele would be deprived of the opportunity to obtain a Federal forum for many cases arising under the Fair Labor Standards Act, and thus deprived of the developed expertise of the Federal judiciary in deciding these cases. Moreover, because the Court's decision in this case will likely have effect far beyond the Fair Labor Standards Act, the AFMA's members' clients may be deprived of the right of removal for cases arising within a whole range of Federal labor legislation.

---

1. The parties have consented to the filing of this brief and written consents of the parties are being filed together with this brief. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel have made a monetary contribution to the preparation or submission of this brief.

The AFMA believes that consistency in the interpretation and application of the law, a value highly desired by its members and their clients, is best served by permitting defendants to remove Federal claims to Federal court except in those rare cases where Congress' intent to prohibit removal is so clearly and unmistakably expressed as to leave no doubt.

SUMMARY OF ARGUMENT

Despite Petitioner's arguments to the contrary, the 1938 enactment of the Fair Labor Standards Act is devoid of any indication of Congressional intent to prohibit removal of FLSA cases filed in state court. Neither the plain language of the statute, nor any of the available limited legislative history, suggest that Congress intended to prohibit removal.

Congress' use of the phrase "may be maintained" was most likely the result of its inconsistent usage in provisions authorizing suit contained in the statutory enactments of the period. Even if Congress intended "maintain" to mean something beyond merely filing an action, the word was most likely intended to guide courts in implementing the right to bring a collective action.

The use of the word maintain is common in Federal labor statutes, and the word is used in contexts which do not in any way suggest directly or indirectly an intent to prohibit removal. Indeed, Congress has on at least one occasion indicated by an amendment to Title 49 that "maintain" and "bring" are synonymous.

The 1948 amendment to the removal statutes created a requirement that any exception to removal of cases in which Federal courts have original jurisdiction must be "expressly

provided" in Congressional enactments. Even prior to the 1948 Amendment, and indeed prior to the passage of the FLSA in 1938, Congress had used express language when stating its intent to prohibit removal. Despite these precursors, Congress did not choose to use such language in the FLSA.

Given the long-running dispute among the courts and commentators as to whether the FLSA prohibits removal, there can be no doubt that the language of the act is ambiguous. Given the requirement of an express provision limiting removal, an argument that FLSA cases may not be removed cannot stand.

The interpretation argued by Petitioner will not clarify Federal labor law. To the contrary, not only will it raise the issue of whether several other Federal labor statutes also prohibit removal, it will needlessly multiply the number of appellate jurisdictions which must resolve FLSA cases. The same policy promoting consistency and even-handed treatment of litigants that may have convinced this court to grant certiorari, should lead it to conclude that removal is not prohibited by the FLSA.

ARGUMENT

I.

THE PHRASE "MAY BE MAINTAINED" IN THE FAIR LABOR STANDARDS ACT DOES NOT SATISFY THE REQUIREMENT THAT AN EXCEPTION TO THE GENERAL REMOVAL STATUTE BE "EXPRESSLY PROVIDED" BY CONGRESS

A. Neither The Plain Language Nor The Legislative Record Of The Fair Labor Standards Act Demonstrates Express Legislative Intent To Prohibit Removal

The Petitioner's arguments, like those raised in so many cases addressing this issue, rely upon two deceptively simple propositions. First, Petitioner contends, Congress' use of the word "maintain" signifies an intention to prohibit removal of FLSA cases to Federal court. Second, Petitioner urges, Congress expressed no intent in its 1948 revision of the removal statute to change that status quo. Both of Petitioner's arguments turn on Congressional intent.

This Court has long recognized two primary sources of Congressional intent in statutory interpretation. The starting point for interpreting a statute is the plain language of the statute itself. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). If statutory language is clear, reliance on other sources is unnecessary. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991). In determining whether the meaning of language is plain or ambiguous, the Court looks to the specific language

at issue, the context in which the language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). When ambiguities remain, this Court turns to the available legislative history for additional insight. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991).

Neither of these techniques avail Petitioner here. The simple irrefutable fact is that neither the language of the FLSA nor any available Congressional materials[2] regarding that statute resolve the issue of what "may be maintained" means. Were it not so, the split among Federal courts and other authorities would not have persisted for over 60 years.

While the Reviser's Notes to the 1948 amendment to the removal statute do not discuss in detail the purpose for the added phrase, no such history is needed. Unlike the phrase "may be maintained" in the FLSA, the meaning of the phrase "unless expressly provided otherwise" added to the removal statute is reasonably clear on its face. Where the will of Congress has been expressed in "reasonably plain terms,"

2. Petitioner quotes an excerpt from a 1958 Congressional report, citing no authority or source, purporting to divine the intent of a Congress 20 years earlier regarding removal of FLSA cases. Petitioner's Brief at 40. That statement is no more authoritative or dispositive than any number of post hoc opinions expressed by judges and commentators on both sides of the issue. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185-86 (1994). Petitioner also notes that the conference committee rejected prior language establishing "concurrent jurisdiction." Petitioner's Brief at 20 n.18. However, the committee also added the right to proceed collectively in this revision, suggesting a different reason for its usage of the word "maintained," as argued in Part I.B.2., below.

its language must "ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). The fair interpretation of that reasonably clear language, as expressed by the Eleventh Circuit and many other courts, is that an exception to the removal statute must be clear and unambiguous.

As argued below, the phrase "may be maintained" does not reach that standard, and should not be construed as prohibiting removal.

B. The Phrase "May Be Maintained" Does Not Imply A Prohibition on Removal

1. The Term "Maintain" Is Best Interpreted As Synonymous With The Term "Bring"

At its heart, Petitioner's argument rests upon an alleged distinction between the terms "maintain" and "bring." Petitioner's Brief at 16-21. In fact, Petitioner concedes that if the FLSA had provided that a plaintiff could "bring" a suit against any employer in any Federal or state court of competent jurisdiction, Petitioner's suit clearly would have been removable. Petitioner's Brief at 17.

The use of the term "maintained" in the FLSA does not reflect a deliberate decision by the Congress to prevent the removal of actions filed under the FLSA. At best, Petitioner has simply illustrated another instance of inconsistent usage in Congressional drafting. Indeed, Petitioner's own brief points out that during the month prior to Congress' passage of the FLSA, Congress enacted laws using operative words or phrases such as "file" an action, "institute proceedings," "apply for enforcement," or stating that an action could be

"brought" or "commenced." Petitioner's Brief at 19. This lack of consistency in drafting undercuts, not supports, Petitioner's argument that "maintain" means something different than "bring" or "file." This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

While Petitioner contends the use of the word "maintain" is highly unusual and thus significant, Congressional enactments prove otherwise.

In the area of labor law alone, the word "maintain" is used commonly, and is used in a context suggesting that it is synonymous with "bring." For example, the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2617(a)(2), provides that "[a]n action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ."[3] A review of the legislative history of the FMLA reflects that the use of

3. Examples of lower courts holding that suits asserting claims under the FMLA are not subject to remand include *Ayotte v. Home Depot U.S.A., Inc.*, No. 3:01-CV-2604-D, 2002 U.S. Dist. LEXIS 571, at *2 (N.D. Tex. Jan. 8, 2002); *Henriquez v. Royal Sonesta, Inc.*, No. 96-0531, 1996 U.S. Dist. LEXIS 4616, 1996 WL 169237 (E.D. La. Apr. 10, 1996); *Ladner v. Alexander & Alexander, Inc.*, 879 F. Supp. 598 (W.D. La. 1995); *see also Holden v. Goodyear Tire & Rubber Co.*, No. 98-4212-RDR, 1999 U.S. Dist. LEXIS 7019 (D. Kan. Apr. 29, 1999) (holding that asserting a claim under the FMLA is sufficient to support removal). However, other courts have held the opposite and remanded FMLA claims back to state court. *See, e.g., Lloyd v. Classic Chevrolet, Inc.*, 82 Empl. Prac. Dec. (CCH) P41 017 (M.D. Fla. Jan. 31, 2002) (removed FMLA claim remanded to state court).

"maintained" was not intended to reflect a express provision prohibiting removal, but rather was simply another way of saying that a suit may be brought in state or Federal court. In the legislative history for the FMLA, Congress noted that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA, which has been in effect since 1938." The Senate noted

> Rights established under the FMLA are enforceable through civil actions. Under section 107, a civil action for damages or equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by an employee, except that an employee's right to bring such an action terminates if the Secretary of Labor files an action seeking monetary relief with respect to that employee.

S. Rep. No. 103-3 at 3, 35, 45 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 5, 37, 47.[4] Nothing in this history suggests any intent to preclude removal. Indeed, as will be discussed below, this history suggests that "maintain," if it means anything beyond "bring," implies an intent to allow plaintiffs to continue suits already filed if the Secretary of Labor initiates an action.

The Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. § 2001, *et seq.*, provides in 29 U.S.C. § 2005(c)(2) that "[a]n action to recover the liability prescribed in paragraph [c](1) may be maintained against the employer in

4. While it was the Senate version of the FMLA which was finally adopted, the House Report contained identical language. *See* H.R. Rep. No. 103-8, pt 1 (1993).

any Federal or State court of competent jurisdiction. . . ." There is no mention in the legislative history of the EPPA of an intention to prohibit removal of actions under the EPPA. Indeed, similar to the FMLA, the Senate Report of the Labor and Human Resources Committee supporting the legislation states that the EPPA "provides for private civil actions by employees or applicants against employers who violate the Act, for appropriate legal or equitable relief in any federal or state court of competent jurisdiction." *See* S. Rep. No. 100-284 at 52 (1988), *reprinted in* 1988 U.S.C.C.A.N. 726, 740; *see also* H.R. Rep. No. 100-208 at 14, *reprinted in* 1988 U.S.C.C.A.N. 726, 752.

The most salient example of the synonymous meanings of "maintain" and "bring" is contained in the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.* The ADEA specifically incorporates the provisions of 29 U.S.C. § 216(b), including the "may be maintained" language. *See* 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216, and 217 of this title").[5] However, the ADEA also provides that "[a]ny person aggrieved may *bring* a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1) (emphasis added). *See also Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820,

5. Lower courts have also split on whether the ADEA permits removal. *See Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460-61 (5th Cir. 1982) (ADEA case initially filed in state court is removable); *Winebarger v. Logan Aluminum*, 839 F. Supp. 17 (W.D. Ky. 1993) (same); *Jacobi v. High Point Label, Inc.*, 442 F. Supp. 518 (same); *but see Lemay v. Budget Rent A Car Sys.*, 993 F. Supp. 1448 (M.D. Fla. 1997) (FLSA and ADEA claims not removable)

825 (1990) (holding that state courts have concurrent jurisdiction to hear claims under Title VII and noting that claims under the ADEA "may be brought 'in any court of competent jurisdiction.'"). Nothing in the text of the ADEA suggests that the intent of Congress was to prohibit removal of ADEA cases filed in state court to Federal court or that Congress would purposely create conflicting provisions. In fact, the legislative history simply notes that the ADEA "gives aggrieved individuals power to bring civil actions for legal and equitable relief," and is silent as to any intent to prevent removal of ADEA actions. H.R. Rep. No. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2223.

Adopting Petitioner's reading of section 216(b) would lead to a direct conflict between different sections of the ADEA. Under the rules of statutory construction, "[w]hen two statutes are capable of co-existence, . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (*quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Thus, the Court is required to read the ambiguous language of section 216(b) in concert with that section 626(a)(1) and hold that it is not an express provision prohibiting removal.

That Congress does not necessarily mean by the word "maintain" something different than "bring" is also shown in the history of Chapter 443 of Title 49 of the U.S. Code. That chapter authorizes the Secretary of Transportation to offer insurance and reinsurance to air carriers conducting flights necessary to carry out the foreign policy of the United States Government. The statute, as originally enacted in the Federal Aviation Act of 1958, provided that a suit under its provisions "may be maintained" in a district court or in the

Court of Federal Claims. P.L. 85-726, § 1310, 72 STAT. 805 (1958). However, as part of a "bill to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation," the 103rd Congress enacted Public Law 103-272, Sec. 1(e), 108 STAT. 1172 (1994), which substituted "a person may bring" for "may be maintained." 49 U.S.C. § 44309. The legislative history for this enactment states that the substitution was made "for clarity." *See* H.R. Rep. 103-180 at 334 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 1151.

As illustrated, Congress regularly utilizes the term "maintain" as a synonym for "bring." All that petitioner has shown is an instance of inconsistent Congressional usage, not an express provision prohibiting removal.

2. Even If "May Be Maintained" Means Something Other Than "May Be Filed," It Does Not Mean Removal Is Prohibited

Petitioner argues at length that "maintain" means something beyond mere filing. Ironically, Petitioner assumes, rather than supports, the proposition that this "something" is a prohibition on removal.

Even if "maintain" means something beyond mere commencement of an action, it does not follow that it necessarily means "keep in state court." There are at least two reasons that are consistent with the FLSA why "maintain" could mean something beyond mere filing without implicating removal.

First, the language of Section 16(b) of the FLSA did not merely grant an employee the right to file suit; it granted "any one or more employees for and in behalf of himself or

themselves and other employees similarly situated" the right to "maintain" an "action." This language has led some courts to conclude that the provisions of Federal Rule of Civil Procedure 23 do not apply to Section 16(b) collective actions. *Bayles v. American Medical Response of Colorado*, 950 F. Supp. 1053, 1066 (D. Colo. 1996) (citing cases). That the language "may be maintained" refers to the right to institute and continue an action collectively rather than constituting a prohibition on removal is implicit in this Court's own interpretation. In *Hoffman-La Roche, Inc. v. Sperling*, this Court cited the "may be maintained" language of Section 16(b), subsequently concluding that the provision "expressly authorizes employees to *bring* collective . . . actions. . . ." and to "*proceed* collectively." 493 U.S. 165, 167, 170 (1989) (emphasis added).

Second, the word "maintain" developed additional meaning when Congress amended the FLSA in 1949 to provide standing for the "Administrator" (subsequently the Secretary of Labor) to bring actions under Sections 16 and 17, (P.L. 81-393, §§ 14-15, 63 STAT. 910, 919 (1949)), and subsequently amended the act in 1961 to terminate the right of an employee to "bring" or to "join" an action, without expressly prohibiting the employee from continuing one, upon the filing of an action by the Secretary of Labor. *See* P.L. 87-30, § 12(a), 75 STAT. 65, 74 (1961). The word "maintain" thus came to symbolize the ability of an employee to continue an individual or collective action even after the Secretary filed suit, and Congress itself used the word "maintain" in that context in the legislative history for the 1961 amendment. *See Burns v. Equitable Life Assurable Soc.*, 696 F.2d 21, 23 (2d Cir. 1982), *citing* Conf. Rep. 327, 87th Cong. 1st Sess. 20, 1961 U.S.C.C.A.N. 1706, 1714.

Because the word "maintain" has meaning within the FLSA far more directly pertinent than the concept of prohibiting removal, Petitioner's argument that the Congressional usage of "maintain" must mean a prohibition on removal merely because it means something beyond "file" is a *non sequitur*, and does not support a contention that removal was expressly prohibited.

C. When Congress Has Intended To Prohibit Removal, It Has Done So Clearly, Even Prior To The Amendment Of The Removal Statute

The general removal statute provides that cases initially filed in state courts over which a Federal district court has original jurisdiction are subject to removal to a Federal district court, unless Congress has expressly provided otherwise. Specifically, 28 U.S.C. § 1441(a) provides, in pertinent part, as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Thus, unless Congress has expressly provided otherwise, a case filed in state court based upon a Federal law is subject to removal to district court, if the case originally could have been filed in Federal court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) (*citing Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could

have been filed in federal court may be removed to federal court by the defendant.")); *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983).

As argued earlier, the starting point for interpreting a statute is the statute itself. *See Alvarez-Sanchez*, 511 U.S. at 356; *Hallstrom*, 493 U.S. at 25. In this case, the language of the operative statute is clear: it requires an act of Congress which "expressly provides" that removal is prohibited. There is no dispute that the Federal district courts have original jurisdiction to hear claims brought against employers pursuant to the FLSA.[6] Thus, the issue in this case is whether the term "may be maintained" in the FLSA satisfies the "expressly provided" requirement and therefore represents an exception to the general rule of the removal statute. The district court and the Eleventh Circuit held that the FLSA did not expressly provide that removal was not permitted.

In affirming the district court, the Eleventh Circuit noted that when Congress intends to exempt a cause of action from the general removal provisions, Congress does so with specificity. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1310 (11th Cir. 2002).

Congress has explicitly prohibited removal of certain suits filed in state court asserting Federal law claims.[7] These

6. Congress has provided that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It is clear that Petitioner's FLSA claim is a civil action arising under the laws of the United States.

7. Congress also provided, in 1958, that notwithstanding diversity jurisdiction, actions arising under state worker's compensation laws are not subject to removal. P.L. 85-554, § 5, 72 STAT. 415 (1958) (codified in 42 U.S.C. § 1445(c) (2003)).

specifically enumerated causes of action that are not subject to removal include an action in state court against a railroad under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-54, 55-60, and a civil action under section 40302 of the Violence Against Women Act of 1994, 42 U.S.C. § 13981.[8] 28 U.S.C. §§ 1445(a), (d). In addition, a civil action against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under 49 U.S.C. § 11706 or 49 U.S.C. § 14706, may not be removed to any district court "unless the matter in controversy exceeds $10,000, exclusive of interest and costs." 42 U.S.C. § 1445(d). Congress has also provided that actions brought pursuant to the Securities Act of 1933 are not subject to removal. 15 U.S.C. § 77(v)(a) ("no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") Similarly, both 15 U.S.C. § 1719 and 15 U.S.C. § 3612 state, in part, that "[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party."

Many of these causes of action that are not subject to removal were enacted prior to the passage of the FLSA in 1938. For example, the relevant provision of the Federal Employers' Liability Act was enacted on April 5, 1910. 36 STAT. L. 291, c. 143. *See, generally, Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). The relevant portion of the Securities Act of 1933 was enacted on May 27, 1933. Others, like the prohibition on removal of certain actions

8. In *United States v. Morrison*, 529 U.S. 598 (2000), this Court determined that the civil enforcement provision of the Violence Against Women Act was unconstitutional.

based upon the Violence Against Women Act, were enacted long after the FLSA. In either case, Congress has made it clear that suits filed under these statutes are not subject to removal.

Unlike these statutes, the language of the Fair Labor Standards Act is simply not explicit about whether or not it prohibits removal to Federal district court. Section 216(b) only provides, in pertinent part, that an action under the FLSA (or Equal Pay Act)[9] "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[10] The language of section 216(b) does not contain the explicit prohibition on removal that is found in these other statutes where the Congressional intent to prohibit removal is clear.

In light of the ability of Congress, both before and after the enactment of the FLSA, to clearly express when removal is not permitted, the argument that "may be maintained" is an express prohibition on removal flies in the face of Congressional usage and practice.

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9. The Equal Pay Act, 29 U.S.C. § 206(d), relies upon the enforcement provisions of the FLSA.

10. Originally, the FLSA provided that an action "may be maintained in any court of competent jurisdiction. . . ." The FLSA was amended in 1974 to the current language. Fair Labor Standards Amendments of 1974, P. L. 93-259 § 6(d)(1), 88 STAT. 61 (1974).

D. Pre-1948 Judicial Interpretations Of The Phrase "May Be Maintained," Even Those Construing The Phrase As Proscribing Removal, Acknowledge That The Phrase "May Be Maintained" Is Ambiguous

When Congress revised the general removal statute in 1948 to incorporate the phrase "[e]xcept as otherwise expressly provided by Act of Congress . . . ," it also consolidated the removal provisions contained in the various statutes relating to removal. 28 U.S.C. § 1441(a). The revised and current removal statute makes it unequivocally clear that, except as expressly provided by an Act of Congress, a defendant may remove any civil action that could have been originally brought in Federal court. *See* 28 U.S.C. § 1441(a).

Prior to this 1948 revision, a provision requiring "express" prohibition of removal did not exist in the various statutes relating to removal. *See* 28 U.S.C. § 71 (1940). Accordingly, prior to 1948, the issue of whether FLSA's "may be maintained" language proscribed removal was not analyzed in relation to today's requirements. However, even without the guidance of 28 U.S.C. § 1441, the issue was extensively examined by the courts and yielded to numerous "irreconcilable conclusions." *Korell v. Bymart, Inc.*, 101 F. Supp. 185, 185 (E.D.N.Y. 1951). Some of these cases have been cited by Petitioner in his Brief.

For example, there is a line of cases interpreting the "may be maintained" language of § 216(b) as meaning that a case commenced in state court must remain in state court. That line of cases has its genesis in *Johnson v. Butler Bros.*, 162 F.2d 87, 89 (8th Cir. 1947), which held that, by using the phrase "may be maintained," Congress demonstrated its intent to grant plaintiffs the right to designate the forum in

which their lawsuits will both be brought and prosecuted to final judgment.

The *Johnson* case was decided one year before Congress revised 28 U.S.C. § 1441. As such, the reasoning in *Johnson* and its prodigy were superceded by those revisions, which were designed to eliminate these ambiguities and conflicting interpretations. As the Reviser's Notes to 28 U.S.C. § 1441 elucidated, these revisions were "intended to resolve ambiguities and conflicts of decisions." *See* Reviser's Notes to 28 U.S.C. § 1441 (cited in *Asher v. William L. Crow Constr. Co.*, 118 F. Supp. 495, 496 (S.D.N.Y. 1953)).

The *Johnson* court did not in any way decide that the "may be maintained" language was an unambiguous expression of Congress' intent. Indeed, the *Johnson* court, because it made its decision prior to the 1948 amendment, had no reason to consider whether the word "maintain" was an express directive of non-removability. Rather, the court, observing that "[t]his question as to the intent of Congress has given the Federal district courts much difficulty," found that "[f]or this unfortunate situation the courts are not to blame. It is attributable to the failure of Congress clearly and accurately to express its intent." 162 F.2d at 89. Therefore, the *Johnson* court construed legislative intent not from the plain meaning of the text, but rather through various intrinsic and extrinsic sources of interpretation.[11]

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11. Indeed, the first and only circuit court prior to the present case to address the issue since the 1948 amendment held that "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal." *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir.), *cert. denied*, 479 U.S. 824 (1986).

Likewise, even the district court cases prior to *Johnson* that rejected removability interpreted the phrase as ambiguous, as evidenced by their reliance upon extrinsic interpretive aids. *See, e.g., Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 455-56 (D. Neb. 1942) (finding that "[p]erhaps the word is not imperatively convincing" and looking beyond text to legislative purpose and to "popular thinking" that the word "maintained" enjoyed a "liberal connotation"); *Fredman v. Foley Bros., Inc.*, 50 F. Supp. 161 (W.D. Mo. 1943) (to resolve ambiguities, looking beyond text to evaluate legislative history, legislative purpose, and the use of "maintained" in other statutes); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158, 159 (D. Ga. 1943) (interpreting ambiguities by looking to "[t]he tokens of intention [both] within the statute and outside of it"); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241, 242 (E.D. Mo. 1946) (to resolve ambiguities, looking beyond text to Congressional Record and other interpretive aids); *Garner v. Mengel Co.*, 50 F. Supp. 794, 796 (W.D. Ky. 1943) (in deciding which interpretation of the term "maintain" to adopt, declaring "[t]his Court feels that there is strong support for each viewpoint").

Courts that upheld the removability of FLSA actions prior to 1948 also perceived this "may be maintained" language as ambiguous. *See, e.g., Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29, 32 (D. Minn. 1944) ("so many different and conflicting constructions appear to have been given to the word, according to the citations in Corpus Juris, that its character for exactitude of meaning is badly damaged"); *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D.N.J. 1940); *Owens v. Greenville News-Piedmont*, 43 F. Supp. 785, 789 (D.S.C. 1942).

Courts have struggled with interpreting FLSA's "may be maintained" language for over 60 years. The ongoing divergence in interpretations demonstrates the ambiguities inherent in the phrase. The fact that Congress has had the time and ability throughout this timeframe to expressly prohibit removal, but has chosen not to do so, despite otherwise amending the FLSA, further supports the conclusion that Congress did not intend to prohibit removal of FLSA action to Federal court. *See Roseman v. Best Buy Co.*, 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001).

While there is no consensus as to the meaning of the phrase "may be maintained," courts generally are in agreement that the language is ambiguous. Since there is no "express" provision in the FLSA capable of consistent interpretation, the requirement of 28 U.S.C. § 1441(a) has not been met.

II.

DENYING REMOVAL OF FLSA CASES WOULD INCREASE UNCERTAINTY AND INCONSISTENCY IN THE APPLICATION OF FEDERAL LABOR AND EMPLOYMENT STATUTES

Petitioner's reading would increase confusion and inconsistency in the application of Federal labor and employment law. If Petitioner's argument were adopted, then the complex thicket of Federal labor and employment law would become even more tangled for both employees and employers.

While resolving the FLSA issue, a decision by this Court reversing the Eleventh Circuit would raise the issue of whether cases arising under the ADEA, FMLA, EPA and

EPPA, statutes relying upon or incorporating the same language found in the FLSA, are subject to removal to Federal court. This decision would create a quagmire of jurisdictional questions for counsel on all sides of employment cases. Claims arising under one set of Federal laws would be subject to removal, while similar claims under other Federal laws might not be.

It is generally conceded that claims of individuals asserting discrimination in violation of Title VII based upon their race, color, national origin, sex, or religion may be filed in state court, but are subject to removal. *See, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825 (1990) (holding that state courts have concurrent jurisdiction to hear claims under Title VII). The same is true with claims of disability discrimination under the ADA.[12] However, claims of age discrimination under the ADEA, a statute interpreted consistent with Title VII[13], might not be subject to removal. Nor might those suits of individuals alleging violations of the FMLA, even though closely-related ADA cases could be removed. Wage discrimination claims based upon gender risk the same inconsistent treatment. Under Petitioner's analysis, a claim brought under the Equal Pay Act would not be subject to removal, because the EPA utilizes the FLSA's enforcement mechanism. *See* 29 U.S.C. § 206(d)(3). If the claim arose under Title VII, it could be removed.

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12. Title I of the ADA is enforced through the procedures established for Title VII. *See* 42 U.S.C. § 12117(a).

13. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000).

In addition, while the AFMA has the utmost respect for state court judges,[14] and its members litigate many matters in state courts, the potential for inconsistent rulings will expand greatly if the Court adopts Petitioner's position. Already employers are confronted with the expense of having to ensure compliance with intertwined and overlapping Federal, state and local employment laws and regulations. Adopting Petitioner's proposed reading of the FLSA would mean that employers would have to worry not only about how the terms of the Federal employment laws have been interpreted by the United States Courts of Appeals, but also by each of numerous states' appellate courts.

The State of Florida, where this case arises, provides a salient example. With most FLSA cases now either being filed in or removed to Federal court,[15] Florida employers (and their counsel) can rely upon the decisions of the Eleventh Circuit Court of Appeals as binding precedent to guide their application of the act to their workforces. AFMA members not only represent their clients in FLSA litigation, but are routinely called upon to provide advice and assistance regarding FLSA compliance by these employers. If Eleventh Circuit appellate precedent is on point, Florida employers can be certain of the state of the law throughout the Federal courts of the State of Florida, as well

14. *See, generally, Martin v. Hunter's Lessee*, 14 U.S. 304, 346-47 (1816).

15. Because of the prevalence of FLSA litigation in Federal court, Federal judges are more likely, in many lawyers' views, to have experience interpreting the FLSA. The AFMA has no doubt that state court judges can develop this expertise, if called upon, but its members often prefer to seek a Federal tribunal which may already have this expertise in interpreting Federal law.

as Georgia and Alabama. Since an employer's compliance with the FLSA requires analysis of the act's requirements, and, in particular, correct application of the so-called "white collar" exemptions, certainty and consistency in decisions interpreting the law are crucial to effective personnel management.

Within the Florida State Court system, however, consistency will be more elusive. In addition to the Florida Supreme Court, which like this Court is a court of limited jurisdiction,[16] Florida has five intermediate appellate courts, the District Courts of Appeal. *See* Art. V, § 4(b), FLA. CONST.; §§ 35.01-35.043, FLA. STATS. (2002). The jurisdiction of these courts is divided geographically. Decisions of one of the District Courts of Appeal are not binding on another. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *Virginia Ins. Reciprocal v. Walker*, 765 So. 2d 229, 233 (Fla. 1st DCA 2000), *review granted*, 779 So. 2d 275 (Fla. 2001); *McDonald's Corp. v. State of Florida Dept. of Transp.*, 535 So. 2d 323, 325 (Fla. 2d DCA 1988); *Durham v. Palm Court, Inc.*, 558 So. 2d 59, 60 (Fla. 4th DCA 1990). The Florida Supreme Court may, but is not required to, resolve certified inter-district conflicts. Art. V, § 3(b)(4), FLA. CONST. Most significantly, while the decisions of this Court on matters of Federal law are binding on all Florida tribunals,[17] the decisions of the U.S. Circuit Courts of Appeals, and most notably the Eleventh Circuit, are not. *Gross v. State*, 765 So. 2d 39,45 (Fla. 2000); *Pignato v. Great Western Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995); *Donald & Co. Securities v. Mid-Florida Community Servs., Inc.*, 620 So. 2d 192, 193-94 (Fla. 2d DCA 1993). As a result, an

16. Art. V, § 3(b), FLA. CONST.

17. *See Howlett v. Rose*, 496 U.S. 356, 366 n.14, 369 n.16 (1990).

employer with operations in Tampa and Orlando, major cities less than 90 miles apart and both within the jurisdiction of the U.S. Middle District, is subject to the potentially conflicting decisions of two different state appellate courts.[18]

In its decision below, the Eleventh Circuit encouraged this Court to resolve the issue of removal under the FLSA, concluding that "litigants should not be treated with such disparity. . . ." 292 F.3d at 1310. The AFMA wholeheartedly agrees with this sentiment, and believes it applies to the outcome of this case as well. Labor law is already complex enough for employers who attempt in good faith to comply with Federal labor and employment laws. Absent clear Congressional intent, it is unnecessary and unwise to subject litigants to the disruptive effects of the potential inconsistency and forum-shopping that eliminating removal from state courts in FLSA cases may bring. The AFMA thus requests this Court to affirm the decision of the Eleventh Circuit and to confirm the removal jurisdiction of the district courts in FLSA and similar cases.

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18. The city of Tampa, in Hillsborough County, lies within the jurisdiction of the Second District Court of Appeal. The city of Orlando, within Orange County, lies within the jurisdiction of the Fifth District Court of Appeal.

CONCLUSION

The AFMA requests that the Court affirm the Eleventh Circuit, adopt the reasoning of that Court and of the First Circuit in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986), and lay to rest this issue once and for all.

Respectfully submitted,

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Supreme Court of the United States

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF HUMAN RESOURCE ASSOCIATION OF PALM BEACH COUNTY AND NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Human Resource Association of Palm Beach County ("HRPBC") formed in 1966 to encourage the exchange of ideas, the discussion of strategies for resolution of problems facing human resources professionals, and the dissemination of information relating to the field of human resources, by and between its members. HRPBC members represent over 150 companies operating in Palm Beach County, Florida. Many of these companies do business in several states. HRPBC is a chapter of the Society for Human Resource Management, a national organization that is the leading voice of the human resource profession.

Amicus curiae National Council of Chain Restaurants ("Council") is a national trade industry group representing the interests of forty of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these forty companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the Council's member companies and their franchisees employ in excess of three million individuals in all fifty states.

The food service industry is particularly labor intensive. Accordingly, issues arising under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), such as

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

child labor, minimum wage, overtime, and white collar exemptions, disproportionately affect the Council's member companies. Furthermore, without exception, each of the Council's member companies operates in more than one state, and many operate in all fifty states. If the typical Council member were expected to comply with the unique interpretations of this federal statute by numerous state courts, their ability to operate on a multi-state basis would be severely hampered. Thus, if the decision below were reversed and FLSA actions held nonremovable, the resulting procedural burden and judicial uncertainty on the Council's member companies would be significant, the express language of the FLSA would be ignored, and the sound policy considerations behind the removability of federal questions would be undermined.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The FLSA is a law of the United States; district courts have original jurisdiction over laws of the United States, so defendants may properly remove FLSA actions filed in state court to federal court. Nothing in the plain language of 29 U.S.C. § 216(b) expressly bars removal of an FLSA action. Petitioner's interpretation of the word "maintained" in isolation without considering the preceding words "may be" is flawed. Rather, the phrase "may be maintained" appearing in 29 U.S.C. § 216(b) establishes *inter alia*, *who* may bring an action, *where* one may bring an action, and *against* whom one may bring, file or

maintain an action – it is not an express prohibition of a defendant's right to remove an action to federal court.

Inclusio unius, exclusio alterius (*i.e.*, the inclusion of one thing indicates the exclusion of the other) is a basic principle of statutory construction. As support for his argument, Petitioner relies on language in a 1958 Senate report. Three of the laws cited in that report contain express language prohibiting removability, but the FLSA does not. As Congress did not create an express provision barring removal of FLSA actions, they are removable to federal court.

The resolution of the issue of removability will also resolve whether actions filed under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* ("FMLA") (which are patterned after the FLSA) are removable to federal court.

As the Court's opinion will impact both plaintiffs and defendants in FLSA, FMLA and ADEA actions, this Court should defer to the decision that Congress made when it created express statutory provisions governing removal of a host of other laws, but not the FLSA.

ARGUMENT

I. THE PLAIN LANGUAGE OF 29 U.S.C. § 216(B) DOES NOT EXPRESSLY BAR REMOVAL OF AN FLSA ACTION FILED IN STATE COURT; PETITIONER'S INTERPRETATION OF THE WORD "MAINTAINED" IS TAKEN OUT OF CONTEXT AND FAILS TO CONSIDER THE PERMISSIVE WORDS "MAY BE" IMMEDIATELY PRECEDING THE WORD "MAINTAINED."

The ultimate issue before this Court is whether an action filed in state court pursuant to 29 U.S.C. § 216(b) of the Fair Labor Standards Act may be removed to federal court. Certain statutes control the resolution of the issue before this Court. First, 29 U.S.C. §§ 201 *et seq.*, the FLSA, is a law of the United States enacted by Congress in 1938 through the exercise of its power to regulate commerce. 29 U.S.C. § 202. Second, 28 U.S.C. § 1331 grants to district courts original jurisdiction over all civil actions arising under the laws of the United States. Third, 28 U.S.C. § 1441(a) states that except as otherwise expressly provided, civil actions brought in state court, of which the district court has original jurisdiction, may be removed by the defendant.

Thus, because the FLSA is a matter over which the federal courts have original jurisdiction, a defendant may remove an FLSA action except as otherwise expressly provided. The specific question is then whether there is any express language in the FLSA, or elsewhere, denying a defendant the right to remove an action filed in state court to federal court, and more particularly, exactly what does "expressly provided" mean?

Petitioner argues that the language contained in 29 U.S.C. § 216(b) evinces Congress's intent to preclude removal of any FLSA action filed in state court. Petitioner asserts that this language is, in fact, express denial of the right to remove:

> [A]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The right provided by this subsection to bring an action . . ., shall terminate upon the filing of a complaint by the Secretary of Labor in an action under 29 U.S.C. § 217 of this title. . . .[2]

29 U.S.C. § 216(b).

However, express language is "clearly indicated, distinctly stated; definite; explicit; plain." *The Random House Dictionary of the English Language* 503 (unabridged ed. 1973). Surely, if the language of the FLSA was, indeed, an express prohibition of removability, Petitioner would not require a forty page Brief On The Merits to convince this Court that his position is sound. *Amici* assert that nothing in the plain language quoted above forecloses removal, as it contains no express language prohibiting removal. *Cf., e.g.*, 28 U.S.C. § 1445 (express nonremovability discussed below).

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[2] 29 U.S.C. § 217, in turn, provides that "The district courts . . . **shall** have jurisdiction, for cause shown, to restrain violations of § 215 of this title. . . ." 29 U.S.C. § 217 (emphasis added).

Petitioner's argument is also flawed in that Petitioner conspicuously fails to address the implications of the word "may" appearing immediately before the words "be maintained." *Amici* note first that "may" is permissive rather than prohibitive language: it explains the rights, opportunities, and avenues available to a plaintiff, but it does not preclude or limit defendants' rights. *See, e.g.*, *The Random House Dictionary of the English Language* 886 (unabridged ed. 1973) (defining "may" as "used to express possibility, opportunity, or permission"). Thus, the phrase "may be maintained," read in context and in conjunction with the other words appearing in the same sentence, simply establishes *who* may bring an action, *where* one may bring an action, *why* one may bring an action, and *against whom* one may file, bring, or maintain an action.

Petitioner also attempts to distinguish the words "file" and "bring" from "maintain" and then transmogrify that distinction into an express denial of removability, contrary to the plain language of the section. Moreover, when comparing the "may be maintained" language in 29 U.S.C. § 216(b) to language in 29 U.S.C. § 217, it is apparent that the term is not nearly as significant as Petitioner believes it to be. 29 U.S.C. § 217 directs that, when the Secretary of Labor files an action for injunctive relief, the action "**shall** be filed in district court." 29 U.S.C. § 217 never uses the term "maintained." Yet, it is understood that the Secretary will maintain the action, not merely file the action, in federal court.

In sum, while Petitioner tempts this Court to parse out the word "maintain" from its surrounding language, it is the collection of words in the phrase "may be maintained" that imparts the meaning of the section. *Amici* assert that a straightforward reading of the express

language of the section permits defendants to remove FLSA actions to federal court.

II. THE STATUTES ARE "CLEAR": ACTIONS UNDER WORKERS' COMPENSATION ACTS, THE JONES ACT, AND THE RAILWAY EMPLOYER'S LIABILITY ACT ARE NONREMOVABLE UNDER 28 U.S.C. § 1445; ACTIONS UNDER THE FAIR LABOR STANDARDS ACT *ARE* REMOVABLE.

Contrary to the view of the minority of courts that have addressed this issue, the language in a 1958 Senate report does not "clearly" show that actions under the FLSA are not removable to federal court. *See, e.g., Lemay v. Budget Rent a Car Systems, Inc.*, 993 F. Supp. 1448, 1450 (M.D. Fla. 1997) ("[T]he report clearly states if an FLSA action is filed in State court, 'the law prohibits removal to the Federal court.'"). To the contrary, and as shown below, the removal provisions of the statutes discussed in the Senate report "clearly" demonstrate Congress's intention to allow removal of FLSA actions.

Petitioner claims that Congress intended that actions under the FLSA not be removed to federal court. Petitioner relies in part on the following statement from a 1958 Senate report on a bill which, among other things, *expressly* prohibits the removal of state court civil actions arising under *state workers' compensation* laws:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws that are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the

> nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act – that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court.

S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106.

The Senate report seems to suggest that the Jones Act, 46 U.S.C. § 688, the Railway Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (also known as the Federal Employers' Liability Act), and the FLSA have similar removal provisions and that the "proposed legislation" is just accomplishing the "same purpose" for state workers' compensation acts. Yet, contrary to the *suggestion* contained in the Senate report, when Congress enacted each of these laws, it specifically distinguished the statutory removal provisions of the Jones Act, Federal Employers' Liability Act, and state workers' compensation acts from the provisions contained in the FLSA.

In 28 U.S.C. § 1445, Congress *expressly* provided that civil actions under state workers' compensation acts and the Federal Employers' Liability Act are nonremovable actions. *See* 28 U.S.C. § 1445(c) (civil actions under state workers' compensation laws are nonremovable); *id.* § 1445(a) (civil actions against railroads under the Federal Employers' Liability Act are nonremovable). In the Jones

Act, Congress expressly incorporated by reference "the general provisions of the Federal Employers' Liability Act," including the provision in 28 U.S.C. § 1445(a) which "prohibits removal of cases brought in the state court." *Stokes v. Victory Carriers, Inc.*, 577 F. Supp. 9, 11 (E.D. Pa. 1983) (holding that suits brought pursuant to the Jones Act in state court are not removable to federal court) (citing *Pate v. Standard Dredging Corp.*, 183 F.2d 498, 500 (5th Cir. 1952)); *see also* Jones Act, 46 U.S.C. § 688(a) ("Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . ."); *McKee v. Merritt-Chapman & Scott Corp.*, 144 F. Supp. 423 (N.D. Ill. 1956) (granting motion to remand Jones Act case originally filed in state court). Thus, the removal of cases under the Jones Act, Federal Employers' Liability Act, and state workers' compensation acts is governed by the express and unequivocal language of 28 U.S.C. § 1445.

Conversely, 28 U.S.C. § 1445 is conspicuously silent as to the removability of FLSA actions; thus, removal of cases under the FLSA is **not** governed by 28 U.S.C. § 1445. Indeed, there is no provision in 28 U.S.C. § 1445, or anywhere else in the U.S. Code, expressly providing – as required by 28 U.S.C. § 1441(a) – that FLSA actions are nonremovable. To the contrary, unlike the other statutes, the FLSA provides that actions "may be maintained against any employer . . . in any Federal or State court"; thus, the plain language of the FLSA does not preclude removal. *See* 28 U.S.C. 216(b).

Petitioner's argument as to the significance of the Senate Report requires this Court to accept the assertions contained in the Report as straightforward matters of fact. However, a critical review of these assertions reveals that the import Petitioner places on the Report is misplaced. Certainly, the statutes enumerated in the Report all deal with workers' compensation of a sort, but they are neither like nor kind. "Workers' compensation" is a term of art used to describe a state scheme to provide medical benefits and some salary continuation for employees injured on the job and unable to work (like the Jones Act and the Federal Employers' Liability Act). *See, e.g.*, Fla. Stat. §§ 440 *et seq.* (2002), *id.* § 440.015 ("It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers' return to gainful reemployment. . . "). Conversely, the workers' compensation contemplated by the FLSA includes minimum wage requirements and overtime pay for those gainfully employed by an enterprise engaged in interstate commerce and prescribes, *inter alia*, child labor prohibitions and record-keeping requirements. 29 U.S.C. §§ 201 *et seq.* *Amici* respectfully urge this Court to resist the temptation to accept the Report as dogma – it is merely a report and not quite accurate.

Even if the Senate Report correctly portrayed the relative nature of the statutes discussed within, Petitioner also errs to the extent he argues that the mere language of a Congressional report, rather than the language of the U.S. Code, can determine whether an action is removable. *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, ___, 122 S. Ct. 1230, 1234 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is

unambiguous."). It is apparent from the language of 28 U.S.C. § 1445 that Congress knows exactly how to make an express provision against removal within the meaning of 28 U.S.C. § 1441(a). Three of the laws cited in the Senate Report have express statutory provisions governing removability, but the FLSA does not. *Inclusio unius, exclusio alterius* (*i.e.*, the inclusion of one thing indicates the exclusion of the other) is a basic principle of statutory construction. *See, e.g., O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 86-87 (1994). Because three statutes were included within 28 U.S.C. § 1445, and the statute at issue, the FLSA, was not, actions under the FLSA are removable to federal court.

III. THE COURT'S DECISION WILL AFFECT REMOVABILITY OF ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND FAMILY AND MEDICAL LEAVE ACT, WHICH ARE PATTERNED AFTER THE FAIR LABOR STANDARDS ACT.

The removability provisions in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, are patterned after the removability provisions in the FLSA. Thus, this Court's decision regarding the removability of FLSA cases will also affect ADEA and FMLA cases.

The ADEA expressly adopted the FLSA's provisions governing removability of state claims. *See* 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in 29 U.S.C. §§ 211(b), 216 (except for subsection (a) thereof), and 217 of this title. . . ."). Similarly the FMLA

contains language governing removability of state claims which mirrors the FLSA. *See* 29 U.S.C. § 2617(a)(2) ("An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees. . . . ").

Like the federal court split over the meaning of the "may be maintained" language in the FLSA, *see Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002), federal courts are also split over the meaning of the same language in the ADEA and FMLA. For example, in *Baldwin v. Sears, Roebuck and Company*, 667 F.2d 458 (5th Cir. 1982), *Kovalic v. DEC International, Inc.*, 855 F.2d 471 (7th Cir. 1988), *Ching v. Mitre Corporation*, 921 F.2d 11 (1st Cir. 1990), and *Winebarger v. Logan Aluminum, Inc.*, 839 F. Supp. 17 (W.D. Ky. 1993), the courts held that ADEA claims could be removed to federal court. However, in *Lemay v. Budget Rent a Car Systems, Inc.*, 993 F. Supp. 1448 (M.D. Fla. 1997), the court remanded an ADEA claim to state court, holding that the "may be maintained" language requires remand of FLSA and ADEA cases. *See id.* at 1449-51 (following *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947), and its progeny).

Similarly, in *Ayotte v. Home Depot U.S.A., Inc.*, 2002 WL 524269 (N.D. Tex. January 8, 2002), *Ladner v. Alexander & Alexander, Inc.*, 879 F. Supp. 598, 599 (W.D. La. 1995), and *Henriquez v. Royal Sonesta, Inc.*, 1996 WL 169237 (E.D. La. April 6, 1996), the district courts allowed removal of FMLA claims. However, in *Lloyd v. Classic Chevrolet, Inc.*, 2002 WL 989470 (N.D. Tex. January 31, 2002), the court remanded an FMLA claim to state court, following the line of cases holding that the similar "may be

maintained" language in the FLSA requires remand. *See id.* at *1 (citing *Johnson* and its progeny).

Accordingly, this Court's decision regarding the removability of FLSA cases will also affect the removability of ADEA and FMLA cases. *Amici*, as representatives of labor-intensive businesses operating multi-state, and of the human resources aspects of businesses operating in many states, urge this Court to hold that FLSA cases, and consequently ADEA and FMLA cases, are removable to federal court.

IV. AS POLICY CONSIDERATIONS IMPACT BOTH PLAINTIFFS AND DEFENDANTS IN FLSA, FMLA, AND ADEA ACTIONS, THIS COURT SHOULD DEFER TO THE POLICY DECISION CONGRESS MADE WHEN IT DID NOT CREATE AN EXPRESS STATUTORY PROVISION BARRING REMOVAL OF FLSA CASES.

The policy considerations underlying the Court's decision will impact both plaintiffs and defendants in FLSA, FMLA, and ADEA actions. Accordingly, this Court should defer to Congress's policy decisions that created express statutory provisions governing removal of a host of other laws, but not the FLSA. As the *Valdivieso* court noted, Congress is best suited to resolve policy considerations. *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371, 1374 (S.D. Fla. 2001).

The cases supporting Petitioner's position identify policy concerns that, these cases argue, might lead this Court to hold that FLSA actions are nonremovable. For example, in *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647 (N.D. Tex. 1964), the court pointed to the

1958 Senate Report's concern that the costs of travel are less in state court than federal court. *Id.* at 648 ("Where the employee commences such a suit in a state court far removed from the nearest federal court the cost of travel and subsistence of the claimant, his witnesses and attorneys, would amount to a denial of the very cause of action conferred by Congress in [29 U.S.C.] § 216(b)."); *see also* S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106 ("Very often cases removed to the federal courts require the workman to travel long distances and to bring his witnesses at great expense."). *Amici* submit that these concerns were stated almost fifty years ago, when there were fewer United States District Courts and transportation and communication were more difficult and expensive than they are today. Today, the main cost of an FLSA action is attorney's fees, which are a much greater burden on defendant employers than on plaintiffs, who are often represented by attorneys on a contingency fee basis. Moreover, the FLSA has a one-way fee-shifting provision: a winning plaintiff may obtain attorney's fees from the defendant, but a winning defendant may not obtain attorney's fees from the plaintiff. *See* 29 U.S.C. § 216(b).

In *Lemay*, another case supporting Petitioner's position, the court stated that one reason for holding that FLSA actions are nonremovable is that "this Court's case load is one of the country's highest in both civil and criminal cases," whereas "state court judges assigned to the civil division hear only civil cases and can proceed with a claim more rapidly." 993 F. Supp. at 1451. *Amici* observe that the relative congestion of the federal and state court dockets in the Middle District of Florida may not be the same in other areas of this country. Moreover, the court's anecdotal observation does not serve to override the

statutory language and policy concerns permitting removal of FLSA actions.

Contrary to Petitioner's claim, many public policy reasons support removal of FLSA actions. First, the FLSA has detailed regulations and interpretations: over six hundred pages of the Code of Federal Regulations are devoted to interpreting the FLSA, *see* Regulations Relating to Labor, 29 C.F.R. Parts 500-899 (2001), and hundreds, if not thousands, of federal cases interpret the FLSA. Second, if states are allowed to add their own interpretations of the FLSA into the mix, it will be almost impossible for multi-state employers to keep track of the differing laws governing employees in each state. This will prove particularly costly to employers: the one-way attorney's fee-shifting provision of the FLSA makes any error in FLSA interpretation costly. Finally, certain benefits of federal court jurisprudence, such as consistency and uniformity, will be undermined by the lack of removability. The need for federal court control over FLSA actions is especially important in light of the unique "opt-in" procedure found in collective FLSA actions. *See* 29 U.S.C. § 216(b). Consequently, the threat of lack of consistency and uniformity between the courts is particularly troublesome to *Amicus* HRPBC, whose members are expected to provide human resources support to businesses operating both within Florida and outside of Florida, and to *Amicus* Council, whose members are concerned with labor intensive operations in all fifty states.

Congress has resolved the policy considerations by creating express statutory provisions governing removal of a host of other laws but not creating an express statutory provision barring removal of FLSA claims. *See* discussion *supra*; *see also* 28 U.S.C. § 1445(b) (providing that claims

under 49 U.S.C. § 11706 or 14706 may only be removed if the amount in controversy exceeds $10,000); 28 U.S.C. § 1445(d) (prohibiting removal of cases brought under the Violence Against Women Act of 1994); 15 U.S.C. § 77v(a) (providing that cases under the Securities Act of 1933 may only be removed in certain circumstances); 15 U.S.C. § 1719 (providing that cases under the Interstate Land Sales Full Disclosure Act shall not be removed unless the United States or an officer or employee of the United States in his official capacity is a party). Accordingly, because Congress has not expressly barred the removal of FLSA actions despite numerous opportunities to do so since the FLSA was enacted in 1938, Congress has made the decision that FLSA actions, and thus ADEA and FMLA actions, are removable.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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